Supreme Court, U.S.
FILED
FEB 18 2009
OFFICE OF THE CLERK

120

No. 08-1062

In The

Supreme Court of the United States

MICHAEL YANNOTTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

DIARMUID WHITE
Counsel of Record
BRENDAN WHITE
WHITE & WHITE
148 East 78th Street
New York, NY 10075
(212) 861-9850

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a conviction for RICO conspiracy, 18 U.S.C. § 1962(d), which *Salinas v. United States*, 522 U.S. 52 (1997), held does not require that the defendant *himself* commit or agree to commit two or more predicate acts, nevertheless requires that the defendant agree that the particular predicate acts charged in the indictment *be committed*, or whether, as the court of appeals held here, it suffices that Petitioner agreed to the overall goals of the racketeering *enterprise* by joining it, even if he did not agree to or even know about the commission of the predicate acts charged in the indictment against other defendants?

2. Whether the court of appeals' holding that evidence of Petitioner's induction into a criminal organization was sufficient to sustain his conviction for RICO conspiracy clashes with Congressional intent and other circuit courts' holdings subsequent to *Salinas v. United States* that RICO conspiracy requires agreeing to the commission of predicate acts charged in the indictment and that membership in a criminal organization is not the same as membership in a particular conspiracy?

3. Since a new privacy interest is created when possession of a cell phone is transferred in a non-transitory manner to a new user, whether law enforcement officers monitoring a cell phone pursuant to an eavesdropping warrant exceeded the warrant's scope and violated the Fourth Amendment when they continued to intercept calls over that phone without

QUESTIONS PRESENTED – Continued

obtaining a new warrant after they learned that the user had transferred the phone to a third person?

4. Whether a racketeering act charging Petitioner with fact-bare, generic loansharking conspiracy offenses not requiring an overt act, spanning ten years and occurring in two federal districts and "elsewhere" contained insufficient factual allegations, thereby violating Fed. R. Crim. P. 7(c) and the Fifth and Sixth Amendment rights the rule is designed to protect?

5. Whether a six-fold increase in a U.S. Sentencing Guidelines sentence, based on unconvicted conduct presented to the jury but not found proved by it, violates the Sixth Amendment right to jury trial and the injunction in 18 U.S.C. § 3553(a)(2)(A) to "promote respect for law"?

6. Where the evidence offered against a defendant concerning unconvicted conduct is solely testimony of cooperating witnesses, which testimony is not credited by the jury, whether, consistent with the Sixth Amendment right to jury trial, the sentencing judge may credit this same testimony to sentence the defendant to the maximum sentence within the Guidelines?

7. Whether a six-fold increase in sentence is reasonable if based solely on the sentencing judge's own determination of the credibility of witness testimony which a jury did not find convincing?

QUESTIONS PRESENTED – Continued

8. Whether a circuit split should be resolved to determine whether a racketeering act not found proved by the jury may be treated by the sentencing judge as "relevant conduct" under the preponderance of evidence standard in U.S. Sentencing Guidelines § 1B1.3(a), or must be treated as an element of the offense under the beyond a reasonable doubt standard in Guidelines § 1B1.2(d), as the Eleventh Circuit has held?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed were as in the caption.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to The Proceeding Below	iv
Table of Authorities	vii
Opinions Below	1
Jurisdiction	1
Constitutional And Statutory Provisions, Rule And Sentencing Guidelines Involved	2
Statement of The Case	5
Reasons for Granting The Petition	16
Conclusion	36

Appendix

Opinion of the United States Court of Appeals for the Second Circuit	App. 1
Opinion of the United States District Court for the Southern District of New York on Post-Trial Motion for Reconsideration	App. 38
Opinion of the United States District Court for the Southern District of New York on Post-Trial Motion	App. 60
Opinion of the United States District Court for the Southern District of New York on Pre-trial Motion	App. 86

TABLE OF CONTENTS – Continued

Page

Transcript of District Court Ruling on Pretrial Motion (Excerpt), July 27, 2005 ..... App. 101

Order of the United States Court of Appeals for the Second Circuit Denying Rehearing..... App. 102

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000).....32

Berger v. New York, 388 U.S. 41 (1967) 26

Blakely v. Washington, 542 U.S. 296 (2004).....30, 32

Horton v. California, 496 U.S. 128 (1990) 25

Katz v. United States, 389 U.S. 347 (1967).....25

Maryland v. Garrison, 480 U.S. 79 (1987).....26

Moss v. Morgan Stanley, Inc., 719 F.2d 5 (2d Cir. 1983) 17

Oregon v. Ice, 129 S.Ct. 711 (2009) 31

Rita v. United States, 551 U.S. 338 (2007) 31, 32

Russell v. United States, 369 U.S. 749 (1962) 28

Salinas v. United States, 522 U.S. 52 (1997).....*passim*

United States v. Aderholt, 87 F.3d 740 (5th Cir. 1996) 34

United States v. Avila, 465 F.3d 796 (7th Cir. 2006) 22

United States v. Booker, 543 U.S. 220 (2005).....31

United States v. Carrozza, 4 F.3d 70 (1st Cir. 1993) 35

United States v. Corrado, 227 F.3d 528 (6th Cir. 2000) 35

United States v. Donovan, 429 U.S. 413 (1977)....23, 24

United States v. Driver, 535 F.3d 424 (6th Cir. 2008) 19, 20, 21

TABLE OF AUTHORITIES – Continued

Page

United States v. Farese, 248 F.3d 1056 (11th Cir. 2001) 33, 34

United States v. Fiander, 547 F.3d 1036 (9th Cir. 2008) 21

United States v. Gotti, 459 F.3d 296 (2d Cir. 2006) 33

United States v. King, 227 F.3d 732 (6th Cir. 2000) 27

United States v. Mercado, 474 F.3d 654 (9th Cir. 2007) 31

United States v. Pungitore, 910 F.2d 1084 (3d Cir. 1990) 17

United States v. Resendiz-Ponce, 549 U.S. 102 (2007) 28, 29

United States v. Starrett, 55 F.3d 1525 (11th Cir. 1995) 20

United States v. The Bonanno Organized Crime Family, 683 F.Supp. 1411 (E.D.N.Y. 1988) 17

United States v. To, 144 F.2d 737 (11th Cir. 1998) 17

United States v. Tocco, 200 F.3d 401 (6th Cir. 2000) 21

United States v. Watts, 519 U.S. 148 (1997) 31

United States v. White, 551 F.3d 381 (6th Cir. 2008) 30, 31

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV 4, 11, 24, 25

U.S. Const. amend. V 4, 13, 27, 28, 30

U.S. Const. amend. VI ..... *passim*

STATUTES, RULES AND GUIDELINES

18 U.S.C. § 371 29

18 U.S.C. § 892 29

18 U.S.C. § 1962(c) 3, 5, 16

18 U.S.C. § 1962(d) 1, 3, 5, 16, 35

18 U.S.C. § 3553(a) 3, 30

Fed. R. Crim. P. 7(c) 4, 12, 28, 30

U.S.S.G. § 1B1.2(d) 4, 16, 33, 34, 35

U.S.S.G. § 1B1.3(a) 4, 16, 33, 34

U.S.S.G. § 2E1.1 ..... 5, 15, 35

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit, in an opinion reported at 541 F.3d 112 and reproduced in the appendix at App. 1, affirmed the judgment of the United States District Court for the Southern District of New York, convicting Petitioner of RICO conspiracy in violation of 18 U.S.C. § 1962(d) and sentencing him principally to 240 months' imprisonment. The pertinent district court's opinions are reported at 457 F.Supp.2d 385, 415 F.Supp.2d 280 and 399 F.Supp.2d 268, and are reproduced in the appendix at App. 38, 60 and 86, respectively.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 2008, and Petitioner's timely petition for rehearing was denied on November 20, 2008. (App. 102) This petition for a writ of certiorari is being timely filed within ninety days of denial of the petition for rehearing in compliance with Rule 13.3 of

this Court's rules. The Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS, RULE AND SENTENCING GUIDELINES INVOLVED

United States Constitution, Amendment IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V, provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . .

United States Constitution, Amendment VI, provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation. . . .

Title 18 United States Code, Section 1962, provides in pertinent part:

. . . .

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Title 18 United States Code, Section 3553(a), provides in pertinent part:

Factors to be considered in imposing a sentence. – . . . . The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense[.]

Rule 7(c)(1) of the Federal Rules of Criminal Procedure provides in pertinent part:

> The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged.

Section 1B1.2(d) of the United States Sentencing Guidelines provides:

> A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

Section 1B1.3(a) of the United States Sentencing Guidelines provides in pertinent part:

> Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
>
> (1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

Section 2E1.1 of the United States Sentencing Guidelines provides:

> *Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations*
>
> (a) Base Offense level (Apply the greater):
>
> (1) 19; or
>
> (2) the offense level applicable to the underlying racketeering activity.

STATEMENT OF THE CASE

1. Petitioner, along with two codefendants, were charged in a superseding indictment with RICO and RICO conspiracy, 18 U.S.C. § 1962(c) and (d), related to the affairs of the Gambino organized crime family.

Count One, alleging the RICO substantive offense, set forth seven racketeering acts, only four of which charged Petitioner. Three of those four racketeering acts indisputably occurred outside the five-year statute of limitations period for a RICO offense; only the fourth, charging loansharking conspiracies, was alleged to have extended into the limitations period. The three remaining racketeering acts, charging only the codefendants, alleged securities fraud conspiracy, construction industry extortion conspiracy, and separate loansharking conspiracies. Each of those racketeering acts was alleged to have occurred within the statute of limitations period. No evidence was offered at trial connecting Petitioner to those

racketeering acts or indicating his awareness of them.

Count Two of the indictment, charging RICO conspiracy, alleged that the three defendants conspired to conduct and participate in the affairs of the Gambino Family "through a pattern of racketeering activity, . . . which pattern is set forth more fully in paragraphs 14 through 20 above, as Racketeering Acts One through Seven," adding that "[e]ach defendant agreed that a conspirator would commit at least two acts of racketeering activity in the conduct of the affairs of the enterprise." (COA App. 43-44)

The jury found Petitioner guilty of RICO conspiracy – without specifying any two racketeering acts he ostensibly agreed be committed – but was unable to reach a verdict on the RICO substantive offense, the verdict sheet indicating that the jury found proven only one of the racketeering acts in which Petitioner was named, alleging loansharking conspiracies. The jury found unproven two of the racketeering acts in which he was named, one consisting of a murder conspiracy and murders and the other consisting of an attempted murder. As to the fourth racketeering act, alleging conspiring to kidnap and kidnapping one Curtis Sliwa and attempting to murder him, the jury found the attempted murder unproven, but was unable to agree on the kidnapping and conspiracy allegations, resulting in a mistrial on the RICO substantive count.

The jury found one codefendant not guilty of the securities fraud conspiracy and was unable to agree on the other charges against him. The other codefendant was found guilty of conspiracy to commit securities fraud, securities fraud and RICO conspiracy, but the jury was unable to agree on the RICO substantive count and the charges of conspiracy to commit extortion in the construction industry.

2. The district court thereafter granted Petitioner's motion for a judgment of acquittal on the RICO substantive count, concluding that there was insufficient evidence that the loansharking conspiracies alleged against Petitioner – the only racketeering act the jury found proved as to him – continued into the five-year statute of limitations period. (App. 75-77) The court, however, denied Petitioner's motion for a judgment of acquittal on the RICO conspiracy count, rejecting Petitioner's argument that the statute of limitations was not satisfied as to that count as well, because he neither committed a charged predicate act within the limitations period nor agreed that the racketeering acts charged only against his codefendants during that period be committed. (App. 82-85) The court reasoned that "[b]ecause the charged enterprise's affairs included construction industry extortion, conspiracy to commit securities fraud, and securities fraud, the statute of limitations was deemed satisfied as to Yannotti even though the Government offered no proof that Yannotti himself

agreed to commit those racketeering acts."[1] (App. 84) The court subsequently denied Petitioner's motion for reconsideration. (App. 38ff.)

3. On Petitioner's appeal, the court of appeals reasoned similarly.[2] The court rejected Petitioner's claim that there was insufficient evidence that he was a member of a RICO conspiracy that included within the pattern of racketeering activity securities fraud and construction industry extortion conspiracies, racketeering acts of which the court of appeals recognized there was no proof Petitioner had knowledge. The court, citing *Salinas v. United States*, 522 U.S. 52, held that Petitioner was nevertheless accountable for those racketeering acts – the only acts that satisfied the statute of limitations – because a conspirator need not be fully informed about his

---

[1] The Government also offered no proof that Petitioner agreed that those racketeering acts *be committed* by anyone or even knew about them.

[2] The court of appeals misapprehended or mischaracterized Petitioner's claim in a number of respects. The court referred to "Yannotti's core argument" that his RICO conspiracy conviction cannot stand "absent proof of his *personal involvement* in" a timely charged predicate act. (App. 17; emphasis added.) Petitioner had made no such argument, one which would have been flatly foreclosed by the holding of *Salinas v. United States*, 522 U.S. 52 (1997).

The court also stated that "Yannotti argues that he should not be held liable for the acts of his *co-conspirators*." (App. 16; emphasis added.) Yannotti did not, nor could he, make such an argument. Rather he argued that he should not be held liable for the acts of his *co-defendants*.

co-conspirators' specific criminal acts, provided that he agreed to participate in the broader criminal conspiracy and the acts evincing participation were not outside the scope of the illegal agreement. (App. 17) The court asserted that "*Salinas* held that to be found guilty of RICO conspiracy, a defendant need only know of, and agree to, the general criminal objective of a jointly undertaken scheme." (App. 17-18, *citing Salinas*, 522 U.S. at 63.)

The sole factual predicate upon which the court rested its conclusion that Petitioner's conduct satisfied the standard it enunciated was that "the evidence showed that Yannotti was formally inducted as a 'soldier' into the Gambino Crime Family at a ceremony in which inductees pledged themselves to use *any* means necessary to further the objectives of the Family." (App. 19; emphasis in original.) This purported evidence, Petitioner submits, is nowhere in the record. In any event, on the basis of this "evidence," the court of appeals held that a reasonable jury could conclude that "when Yannotti agreed to participate in the affairs of the Gambino Family . . . [he] agreed that he, and others would engage in a jointly undertaken pattern of racketeering activities reaching all of the predicates established by the government." (App. 19)

4. At Petitioner's trial, to prove the loansharking conspiracy allegations against him, the prosecution introduced two intercepted conversations between Petitioner, who was in Florida at the time, and asserted loansharking customers over a cell

phone then in Petitioner's possession. The conversations were intercepted by FBI agents who had obtained an order authorizing the interception of calls over a cell phone being used by Nicholas Corozzo, a New Yorker, while visiting Florida in April 1996. The application for the order stated that Corozzo had asked a confidential source ("CS") "whether the CS could obtain a cellular for him which he, COROZZO, would only utilize in Florida" and informed the CS that, to avoid detection, the clone telephones "that he possesses are frequently changed." (COA App. 98)

A progress report to the issuing judge after eavesdropping had begun reported that "[o]n April 13, 1996, at approximately 6pm, just prior to his return trip to New York, COROZZO provided the target cellular phone to MICHAEL YANNOTTI, an associate of the Gambino Organized Crime Family. At the same time, COROZZO indicated that he would be returning to the Southern District of Florida within a couple of weeks." (COA App. 109) Logs kept by monitoring agents and annexed to the report indicated that the cell phone was never actually used by Corozzo after the interception began, but was in the possession of and used by his girlfriend, Eileen Casotto, solely and continuously, on April 12 and 13, 1996, before it was later possessed and used by Petitioner. (COA App. 113-21)

Petitioner moved to suppress the conversations because the agents continued to intercept calls over that cell phone even after they knew that Corozzo no longer possessed it and had left it in Florida when he

returned to New York. Petitioner maintained that this continued interception constituted an unreasonable search under the Fourth Amendment because it expanded the scope of the order and converted it to one akin to a general warrant.

The district court acknowledged that the issuing judge's "probable cause determination was premised on Corozzo's possession of the phone" (App. 97), but denied the motion. The court reasoned that cell phones "are mobile and can be easily handed from one person to another," and therefore "[i]f the Government were not allowed to intercept outgoing calls made on the target cell phone by parties other than Corozzo without first obtaining a new wiretap authorization, it would be effectively impossible to wiretap this or any other cell phone." (App. 97) The court concluded, in effect, that it was for the agents to determine whether, even though Corozzo no longer possessed the cell phone, there was "probable cause to believe that the cell phone remained an instrumentality of the alleged conspiracy." (App. 98)

The court of appeals misapprehended Petitioner's claim as seeking suppression "because the government's original wiretap application did not specifically *name* him as a target," (App. 22; emphasis added) a claim Petitioner made neither in the district court nor in the court of appeals. In any event, the court concluded that "the government had no reason to believe that Yannotti would indefinitely maintain possession of the cell phone" and therefore "acted

reasonably in suspecting that Corozzo would return to Florida and re-claim his phone." (App. 24)

5. A racketeering act charged Petitioner alone with fact-bare, generic loansharking offenses – financing extortionate extensions of credit, conspiracy to make extensions of credit, and conspiracy to collect extensions of credit through extortionate means – each spanning ten years, from 1993 through 2002, and occurring in two federal districts and "elsewhere." (COA App. 41) For example, with respect to conspiracy to make extortionate extensions of credit, it alleged:

> b. From in or about 1993, up through and including in or about 2002, in the Southern District of New York, the Eastern District of New York, and elsewhere, MICHAEL YANNOTTI, a/k/a "Mikey Y," the defendant, and others known and unknown, unlawfully, willfully, and knowingly combined, conspired, confederated, and agreed together and with each other to make extortionate extensions of credit, as that term is defined in Title 18, United States Code, Section 891, in violation of Title 18, United States Code, Section 892. (COA App. 41-42)

The allegations were similarly spare for the other variations of loansharking alleged. (COA App. 41-42)

Petitioner's pretrial motion contending that this racketeering act should be dismissed because it contained insufficient factual allegations, in violation of Rule 7(c) of the Federal Rules of Criminal

Procedure and the Fifth and Sixth Amendments, was denied. (App. 101) The court of appeals upheld that ruling, holding that "the indictment provided Yannotti with sufficient notice of the allegations regarding loansharking," which notice was supplemented by discovery provided by the Government. (App. 31) The court did not address Petitioner's claim that, aside from the question of notice, the indictment clause of the Fifth Amendment requires enough factual particularity to ensure that a defendant will not be prosecuted and convicted for a crime based on evidence not presented to or considered by the grand jury.

6. The jury's guilty verdict on the RICO conspiracy count did not specify the racketeering acts on which it was based. The verdict sheet with respect to the RICO substantive offense, on the other hand, did indicate the jury's findings on the racketeering acts. (COA App. 276) As to the two murders and two attempted murders alleged against Petitioner as racketeering acts, the jury unanimously found all of them not proved. Only the racketeering act alleging loansharking conspiracy was found proved. On the racketeering act of conspiring to kidnap and kidnapping Sliwa, which, as to Petitioner, hinged totally on the testimony of two cooperating witnesses, Joseph D'Angelo and Michael DiLeonardo, the jury split

seven for proved and five for not proved, necessarily reflecting doubts about the witnesses' credibility.[3]

Nevertheless, in sentencing Petitioner for RICO conspiracy the district court, based solely on its own determination of credibility, found by a preponderance of evidence that Petitioner did commit the Sliwa racketeering act, ruling as follows:

> I turn to the kidnapping and attempted murder of Curtis Sliwa. I begin by noting that these charges were presented to only one jury and that jury was unable to reach a verdict.[4] We do know that the jury was deeply split on the issue with seven jurors out of twelve believing that there was proof beyond a reasonable doubt that Yannotti had engaged in these actions. I had no trouble finding, based on the evidence presented at this trial and at two subsequent trials,[5] that

---

[3] Sliwa also testified about the incident, but did not identify Petitioner as a participant.

[4] This statement is inaccurate. Actually, the jury unanimously found that the attempted murder charge was not proved. The jury was unable to reach a verdict only on the kidnapping charges. (COA App. at 276)

[5] "Two subsequent trials" refers to the retrials of codefendant John A. Gotti, following two mistrials. Gotti was charged with conspiring to kidnap Sliwa, but not with kidnapping and attempted murder. Petitioner did not participate in the two subsequent trials. Gotti was not convicted at either of those trials.

> the government has proved by a fair preponderance of the credible evidence that Yannotti is responsible for these crimes.
>
> First, I found the testimony of Joseph D'Angelo to be credible and note that no jury has ever entered a judgment of acquittal of any defendant based solely on D'Angelo's testimony.
>
> While I'm less confident that all of the testimony given by Michael DiLeonardo [*sic*], I do find that to the extent it collaborates [*sic*] Yannotti's role in the Sliwa shooting, it was completely credible. Thus, by a fair preponderance of the evidence, Yannotti's role in the Sliwa attack will be considered as relevant conduct. (COA App. 300-01)

The court accordingly rejected the recommendation in the presentence report that Petitioner be sentenced to 41 months – based on the fact that loansharking conspiracy was the only RICO predicate that the jury found proved, resulting in an offense level of 20 under U.S. Sentencing Guidelines ("U.S.S.G.") § 2E1.1 – and imposed instead a sentence six times greater, the statutory maximum of 240 months, since the kidnapping racketeering act raised the offense level to 36. (COA App. 301-02)

The court of appeals held that the district court appropriately considered the Sliwa kidnapping in sentencing Petitioner, since acquitted conduct may be considered at sentencing. (App. 36) The court also rejected Petitioner's argument that a racketeering act

not found proven by the jury must be treated by the sentencing judge as an element of the offense under the beyond a reasonable doubt standard in U.S.S.G. § 1B1.2(d), not as "relevant conduct" under the preponderance of evidence standard in U.S.S.G. § 1B1.3(a). (App. 34-36) On that issue, the court sided with the holdings of the First and Sixth Circuits and rejected the contrary holding of the Eleventh Circuit. (App. 34-36)

REASONS FOR GRANTING THE PETITION

I

The Court of Appeals' Holding That Evidence of Petitioner's Induction into An Organized Crime Family Was Sufficient to Sustain His Conviction for RICO Conspiracy Is An Unwarranted Expansion of *Salinas v. United States*, Clashes with Congressional Intent, And Is at Odds with Other Circuit Courts' Holdings Subsequent to *Salinas*.

1. The holding of *Salinas v. United States*, 522 U.S. 52, was that a RICO conspiracy violation under 18 U.S.C. § 1962(d) does not require that the defendant himself commit or agree to commit the two predicate acts necessary for a substantive RICO offense under § 1962(c); "it suffices that he adopt the goal of furthering or facilitating the criminal endeavor" which, if completed, would satisfy all the elements of the substantive RICO offense. *Id.* at 367.

Accordingly, even if defendant Salinas himself did not accept or agree to accept the predicate bribes alleged in the indictment against him and his superior, he was properly convicted of RICO conspiracy because the evidence showed that his superior "committed at least two acts of racketeering activity when he accepted numerous bribes and that Salinas *knew about and agreed to facilitate the scheme*." *Id.* at 367 (emphasis added).

Other courts of appeals, as discussed below, have read *Salinas* as still requiring evidence that a defendant agreed to the commission of at least two predicate acts charged in the indictment, not as establishing that a defendant's membership in a criminal organization is sufficient to prove that he conspired with other members to violate the RICO statute. This accords with RICO's legislative history, indicating that Congress rejected the notion that membership in the Mafia is a RICO offense.[6]

---

[6] *See Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 21 n.17 (2d Cir. 1983) (citing legislative history of RICO statute stating that "mere membership" in an organized crime organization "should not be punished"); *see also United States v. To*, 144 F.2d 737, 746 (11th Cir. 1998) ("[a] defendant must be convicted on the basis of his own proven conduct, association is not enough[;] RICO does not punish 'mere association with conspirators or knowledge of illegal activity; its proscriptions are directed against conduct, not status' ") (citation omitted); *United States v. Pungitore*, 910 F.2d 1084, 1147 n.91 (3d Cir. 1990) (noting "district court's vigilance in instructing the jury that mere membership in the Mafia did not constitute a crime"); *United States v. The Bonanno Organized Crime Family*, 683 F.Supp. 1411, 1429 (E.D.N.Y.

(Continued on following page)

2. The court of appeals here, even while recognizing that there was no proof that Petitioner knew about the predicate acts alleged in the indictment against his codefendants, held, on the authority of *Salinas*, that Petitioner was nevertheless accountable for those racketeering acts – the only acts that satisfied the statute of limitations – because a conspirator need not be fully informed about his co-conspirators' specific criminal acts, provided that he agreed to participate in the broader criminal conspiracy and the acts evincing participation were not outside the scope of the illegal agreement. (App. 17-18, 20) Since, the court held, there was evidence that Petitioner had been inducted into the Gambino organized crime family, a reasonable jury could conclude that "when Yannotti agreed to participate in the affairs of the Gambino Family . . . [he] agreed that he, and others would engage in a jointly undertaken pattern of racketeering activities reaching *all of the predicates* established by the government."[7] (App. 19; emphasis added.)

1988) ("Congress specifically declined to make mere membership in an organized crime organization a RICO offense").

[7] As noted above in the Statement of the Case, the court of appeals stated that "the evidence showed that Yannotti was formally inducted as a 'soldier' into the Gambino Crime Family at a ceremony in which inductees pledged themselves to use any means necessary to further the objectives of the Family." (App. 19) This broad statement – critical to the court's line of reasoning – is absolutely unsupported by the record. There was some evidence that Petitioner was inducted into the Gambino Family, albeit not "formally," but no evidence whatsoever that he, or any

(Continued on following page)

The court of appeals' holding effectively makes mere membership in the Mafia – and presumably any criminal gang – punishable under the RICO conspiracy statute, since Petitioner's conviction was sustained solely on evidence that he was inducted into the Gambino Family. It follows that any person who becomes a member of an organized crime Family can be convicted of RICO conspiracy whenever, for the entire course of his life or membership, any other member or associate of that Family commits or agrees to commit a pattern of two racketeering acts.

This catapults the contained result in *Salinas* into the far-reaching notion that induction into an organized crime Family constitutes an open-ended agreement to the commission of any racketeering acts by all other members – known or unknown, agreed to or not – and thus suffices as proof of RICO conspiracy. This is an unwarranted expansion of *Salinas*, clashes with Congressional intent, and is at odds with other circuit courts' holdings subsequent to *Salinas*.

3. Shortly after the court of appeals' decision in this case, the Sixth Circuit reversed for insufficient evidence the RICO conspiracy conviction of a "patched member" of the Outlaw Motorcycle Club ("OMC").[8] *United States v. Driver*, 535 F.3d 424 (6th

---

other inductee, "pledged themselves to use any means necessary to further the objectives of the Family."

[8] A "patched" or "patchwearing" member is a "full-fledged" member as opposed to a probationary or "probate" member. To become an Outlaw, a probate member must be sponsored by a

(Continued on following page)

Cir. 2008). After quoting from *Salinas*, the Sixth Circuit stated:

> Accordingly, even if there is not sufficient evidence to prove that Driver committed two predicate acts himself, Driver's RICO conspiracy conviction can be sustained if there is evidence sufficient to prove that Driver agreed that *someone* would commit two predicate acts.

Id. at 432 (emphasis in original). The Sixth Circuit nevertheless reversed, even though there was proof beyond a reasonable doubt that "members of the OMC agreed to violate the drug laws." *Id.* at 430. The court determined that one alleged racketeering act against defendant Driver – a drug distribution conspiracy – was proved, but not a second – a substantive violation of the Travel Act by Driver and the head of an OMC chapter designed to promote distribution of drugs. Even though Driver was a full-fledged OMC member and accompanied the OMC chapter head to another state for a "bosses meeting," where drug distribution was regularly discussed, and even though Driver had extensive contact with one Keeler, the head of another OMC chapter, the Sixth Circuit concluded that there was insufficient evidence that Driver "agreed to the commission of any other predicate act *charged in the indictment*." *Id.* at 432 (emphasis added). The court added that Driver's

---

patched member. *See United States v. Starrett*, 55 F.3d 1525, 1533 (11th Cir. 1995).

"extensive contact with Keeler . . . does not establish that Driver assented to any of the predicate acts allegedly attributable to Keeler." *Id.* at 433. The court observed that "Driver's mere association with the OMC is not sufficient to prove that he conspired with other OMC members to violate the RICO statute." *Id.*

Unlike the court of appeals here, the *Driver* court found nothing in *Salinas* to support the expansive view that Driver's membership in the OMC proved his agreement to OMC's general criminal objective, thereby making him accountable for the acts of all OMC members within the scope of that objective. Indeed, in *United States v. Tocco*, 200 F.3d 401 (6th Cir. 2000), the Sixth Circuit applied *Salinas* and upheld the RICO conspiracy conviction of even the "*boss*" of the "Detroit Cosa Nostra Family" only after finding in the record "sufficient evidence for a rational jury to find that Tocco agreed to 'facilitate . . . some of the acts leading to the substantive offenses' *charged*." *Id.* at 426, *citing Salinas*, 522 U.S. at 65 (elision the Sixth Circuit's) (emphasis added).

The court of appeals here, on the other hand, believed that "*Salinas* held that to be found guilty of RICO conspiracy, a defendant need only know of, and agree to, the general criminal objective of a jointly undertaken scheme." (App. 17-18, *citing Salinas*, 522 U.S. at 63.) This "generalizing" of *Salinas*' holding is not supported by its text, at page 63 or elsewhere.

Also subsequent to the court of appeals' decision in this case, the Ninth Circuit in *United States v.*

Fiander, 547 F.3d 1036 (9th Cir. 2008), reinstated a RICO conspiracy charge based on predicate acts of contraband cigarettes trafficking, which charge had been dismissed by the district court due to insufficient allegations in the indictment. The Ninth Circuit noted that the indictment alleged that Fiander was a member of the Mahoney Enterprise, which trafficked in contraband cigarettes, that he had agreed to commit the substantive offense of contraband cigarettes trafficking, and that he knew about the objective of the enterprise and knowingly agreed to facilitate it. *Id.* at 1041-42. The court, applying *Salinas*, held that "[t]he indictment accordingly sufficiently alleges that Fiander agreed to facilitate the commission of the crime of contraband cigarette trafficking." *Id.* at 1042. Again, something more than membership in the enterprise and a generalized knowledge of its goals was required.

Although not a RICO case, *United States v. Avila*, 465 F.3d 796 (7th Cir. 2006), a Latin Kings drug conspiracy prosecution, is instructive. There the Seventh Circuit observed that "[t]he government has confused gang membership with membership in a conspiracy, forgetting that 'to join a conspiracy . . . is to join an agreement, rather than a group.'" *Id.* at 798 (elision in original) (citations omitted). The court explained: "[O]ne might join a gang to feel like a big shot or to obtain immunity from being beaten up by gang members, without participating in the gang's criminal activities." *Id.* So, too, to hold a member of a Mafia Family accountable for all racketeering acts

committed by all other members of that Family, as the court of appeals' holding effectively does, extends the principles of conspiratorial liability beyond that intended by Congress in enacting RICO.

Certiorari should therefore be granted to delimit the scope of the RICO conspiracy statute and the holding in *Salinas* and to reconcile the disparate positions of different circuits.

II

Since A Cell Phone Is Portable And Transferable, A New, Non-Transitory Possessor of The Phone Reflects A New Privacy Interest under The Fourth Amendment, Requiring A New Court Order Before Electronic Surveillance May Continue, Unless, for Example, The Applicant Has in The First Instance Provided The Issuing Court with Cause to Believe That The Phone May Be Transferred to Other Individuals for Use in The Targeted Crimes And The Order Provides for Continued Interception in That Event.

4. Fourth Amendment jurisprudence needs development to determine what reasonable expectation of privacy exists in the now almost universal cell phone, which, unlike the land-line phones that most eavesdropping cases over the past 40 years have concerned, is portable and transferable and can readily be given, loaned or sold to another. Thus, when in *United States v. Donovan*, 429 U.S. 413

(1977), the Court indicated that "in the wiretap context" the requirements of the Fourth Amendment are satisfied "by identification of the telephone line to be tapped and the particular conversations to be seized," *id.* at 427 n.15, this statement was made with traditional land-line telephones in mind, telephones which are anchored to fixed premises. An order identifying "the telephone line to be tapped" may have been sufficient in 1977, but that precept seems archaic in light of present-day technology, where cell phones are rooted in no particular place and with no particular person.

It is reasonable that a new, non-transient possessor of a cell phone reflects a new privacy interest, requiring a new court order before electronic surveillance may continue, at least where the application in support of the order has not provided the issuing court with cause to believe that the phone may be transferred to other individuals for use in the targeted crimes and the order does not provide for continued interception in the event of such a transfer.

5. Here, the monitoring agents, at the time they intercepted Petitioner's conversations, knew that Corozzo's girlfriend, not Corozzo, had been using the cell phone for at least two days and that Corozzo could not use it, if ever, for at least "a couple of weeks" if and when he returned from New York to Florida. For the agents, nevertheless, to continue to intercept conversations over that phone when it had passed into the hands of a third person, Petitioner, was an unreasonable search, because Petitioner had a

reasonable expectation of privacy in making calls over the phone he now possessed.[9] *See Katz v. United States*, 389 U.S. 347, 351, 353 (1967) ("the Fourth Amendment protects people, not places" and "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth").

Moreover, the eavesdropping order here cannot be reasonably interpreted as authorizing continued interceptions over the phone if possession passed on to persons other than Corozzo, and thus the agents exceeded the scope of the order. *Horton v. California*, 496 U.S. 128, 140 (1990) ("if the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more").

Finally, if the order were interpreted as permitting the agents to seize conversations over the cell phone regardless of whether the phone changed hands once, twice or even more, this would "leave[ ] too much to the discretion of the officer executing the

---

[9] This is not a case in which a person merely used another's cell phone to make a call, with constructive possession remaining with the cell phone owner, but a much narrower case in which Corozzo relinquished possession of the cell phone and effectively abandoned it. Thus, there is no genuine basis for concern that the casual use of another's cell phone to make a call would trigger the need for a new wiretap authorization.

order," *Berger v. New York*, 388 U.S. 41, 49 (1967), officers like those here who went right ahead and intercepted calls even though they knew that Corozzo no longer had the phone, had not used it since the intercepting began, and was not even in Florida anymore.

6. The district court's view that "despite Corozzo's departure" the agents "had reason to believe" that the cell phone would "continue to be used" to discuss the target offenses and that "although Corozzo no longer possessed the phone, there was probable cause to believe that it remained an instrumentality of the alleged conspiracy" (App. 17-18) – which reasoning the court of appeals endorsed (App. 25) – is invalid, because it is for a neutral and detached magistrate, not the agents, to make such determinations.

Here, at the very least, once the agents knew that Corozzo was leaving Florida and had transferred the phone to Petitioner – a phone that apparently only Corozzo's girlfriend had used during the period of interception – they were obliged to cease intercepting communications, return to the issuing judge and, upon an appropriate showing of probable cause, obtain a new order authorizing the interception of Petitioner's communications over that phone. *Cf. Maryland v. Garrison*, 480 U.S. 79, 80-81 (1987) (where search warrant authorized search of "premises known as 2036 Park Avenue third floor apartment," officers properly recognized that "they were required to discontinue the search of [the defendant's]

apartment as soon as they discovered that there were two separate units on the third floor"); *United States v. King*, 227 F.3d 732, 752 (6th Cir. 2000) ("officer should have sought a search warrant for the basement area when he came upon it during the course of the search of Defendant's unit . . . his decision to proceed without a warrant was flagrant and unreasonable under these facts").

Certiorari should be granted to decide whether, in cases where possession of a cell phone has been transferred in a non-transitory manner, an application must be made to a judge for a new warrant, assuming probable cause, to intercept conversations over the cell phone now possessed by a different individual.

III

An Indictment's Allegations of Fact-Bare, Generic Offenses – Here Spanning Ten Years, Occurring in Two Federal Districts And "Elsewhere" – Do Not Comply with The Indictment Clause of The Fifth Amendment, Even If It Could Be Said That, in Light of Discovery, The Defendant Received Notice of The Charges Sufficient to Comply with The Sixth Amendment.

7. If an indictment does not allege essential facts, "a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him."

Russell v. United States, 369 U.S. 749, 770 (1962). Thus, Fed. R. Crim. P. 7(c), embodying both the indictment clause of the Fifth Amendment and the notice clause of the Sixth Amendment, requires that "[t]he indictment or information must be a plain, concise, and definite written statement of *the essential facts* constituting the offense charged." (Emphasis added.)

Yet, in assessing the sufficiency of an indictment's allegations, district courts and courts of appeals, as here, frequently focus on "notice" and look to discovery, a bill of particulars, or other extra-indictment information in deciding whether notice was adequate and, hence, the allegations sufficient.

Since such extra-indictment information is a product of the prosecutor's office not the grand jury, it affords prosecutors the opportunity to supply elements of its case with facts different from those considered by the grand jury. In complex federal prosecutions, where much evidence is uncovered after indictment as a result of codefendants entering into cooperation agreements and where cooperating witnesses rarely testify before the grand jury, it is important to ensure that charges in the indictment returned by the grand jury are not transformed by the time of trial into different crimes with different co-conspirators.

8. In *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007), the use of the word "attempt," coupled with the *specification of the time and place* of the

defendant's illegal entry, satisfied the constitutional requirements for an indictment. It may very well be that indictments that do little more than to track the language of the statute charged and state the time and place of the alleged crime in approximate terms will adequately supply the essential facts of the crime charged, especially if it is an offense committed on a particular occasion. But where the charged offense is as long and broad as that charged here, and especially where no overt act is required, such information is inadequate. *See Resendiz-Ponce*, 549 U.S. at 109 ("while an indictment parroting the language of a federal criminal statute is often sufficient, there are crimes that must be charged with greater specificity").

Where a conspiracy is charged under the general conspiracy statute, 18 U.S.C. § 371, the statute's requirement that an overt act be pled and proven provides, at least, *some* factual point of reference for defendants. Where, however, there is no overt act requirement, as with a conspiracy to make an extortionate extension of credit, *see* 18 U.S.C. § 892, there is a greater need for essential facts to be stated in the charge.

Here, the pertinent racketeering act alleged no concrete fact, and the broad temporal and geographic scope of the charges – ten-year conspiracies with unnamed co-conspirators in two federal districts and beyond – provided a fertile field for post-indictment back-filling, if a prosecutor so chose.

Certiorari should be granted to decide whether the right set forth in the indictment clause of the Fifth Amendment, as reflected in Fed. R. Crim. P. 7(c), is being adequately protected.

IV

A Six-Fold Increase in A U.S. Sentencing Guidelines Sentence, Based on Judge-Found Facts regarding Unconvicted Conduct Which The Jury Found Not Proved Because The Jury Did Not Credit The Witnesses, Is Unreasonable And Violates The Sixth Amendment Right to Jury Trial And The Injunction in 18 U.S.C. § 3553(a)(2)(A) To "Promote Respect for Law."

9. No lay citizen, told that a judge could increase a defendant's sentence six-fold on the basis of her or his own determination of the credibility of witness testimony which a jury did not find convincing, would consider this anything less than an affront to his or her conception of American justice. Thus, such a sentence does not "promote respect for law," 18 U.S.C. § 3553(a)(2)(A), a sentencing requirement prescribed by Congress. *United States v. White*, 551 F.3d 381, 2008 U.S. App. LEXIS 26095, *46-47 (6th Cir. Dec. 24, 2008) (en banc) (dissent).

More fundamentally, such a sentence violates the Sixth Amendment right to trial by jury. *See Blakely v. Washington*, 542 U.S. 296, 308 (2004) (the right to a jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional

structure . . . meant to ensure [the people's] control in the judiciary"). It is an open question in this Court whether a sentence increased on the basis of conduct found not proved by the jury violates the right to trial by jury. *Cf. Oregon v. Ice*, 129 S.Ct. 711 (2009) (Sixth Amendment does not inhibit States from assigning to judges, rather than juries, finding of facts necessary to imposition of consecutive sentences, since decision as to consecutive sentences was not entrusted to juries at common law).

In *United States v. Watts*, 519 U.S. 148 (1997), the Court held only that the *Double Jeopardy Clause* does not bar a sentencing judge from considering acquitted conduct. *See United States v. Booker*, 543 U.S. 220, 240 n.4 (2005) ("*Watts*, in particular, presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause"). But the Court has never held that the Sixth Amendment right to jury trial does not bar consideration of conduct presented to the jury and found not proved by it. *See United States v. White*, 551 F.3d 381, 2008 U.S. App. LEXIS 26095 at *30-33; *United States v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (dissent).

10. The judge's finding here that the Petitioner was involved in unconvicted conduct, the Sliwa kidnapping, was a "legally essential predicate," *Rita v. United States*, 551 U.S. 338, 127 S.Ct. 2456, 2477 (2007) (Scalia, J., concurring in part and in the judgment), for increasing Petitioner's Guidelines offense level from 20 to 36 – calling for a 240-month

sentence. The sentence would have been "unreasonable," and thus unlawful, but for the judge-found facts. *See id.* Consequently, those facts, as a "legally essential predicate" for increasing the sentence, should be found *by a jury* under the Sixth Amendment and under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296. But the Court has yet to resolve this question.

A sentence based solely on a judge's second-guessing jurors' assessment of credibility is offensive to American ideals. The 240-month sentence imposed on Petitioner based on unconvicted conduct found by the judge after the jury did not so find – rather than the 41-month sentence that the jury's findings did support – makes a mockery of the concept of trial by jury. Petitioner was sentenced almost as if there had been no trial at all; as if he had entered into a negotiated plea calling for a 20-year sentence rather than putting the Government to its proof before a jury; or as if the jury *had* believed the witnesses and found the conduct at issue proven.[10]

---

[10] If the district court had suppressed a confession or there were other objective grounds, unknown to the jurors, for concluding that Petitioner had been involved in the Sliwa kidnapping, or if there had been some new evidence presented in connection with the sentencing hearing, consideration of that conduct in sentencing Petitioner might be less offensive. But here, the judge's finding was based solely on her personal view of the witnesses' credibility. This is particularly galling in that the judge's credibility finding, notwithstanding the jury's

(Continued on following page)

Certiorari should be granted so the Court can finally reach the issue of whether the Sixth Amendment prohibits an increased sentence based on conduct which a jury has found not proven.

V

A Circuit Split Should Be Resolved to Determine Whether A Racketeering Act Not Found Proven by The Jury May Be Treated by The Sentencing Judge As "Relevant Conduct" under The Preponderance of Evidence Standard in U.S. Sentencing Guidelines § 1B1.3(a), Or Must Be Treated As An Element of The Offense under The Beyond A Reasonable Doubt Standard in Guidelines § 1B1.2(d).

11. The jury's guilty verdict on RICO conspiracy did not specify the racketeering acts on which it was based. In *United States v. Farese*, 248 F.3d 1056 (11th Cir. 2001), where the defendants pled guilty to RICO conspiracy, but their pleas did not establish "whether money laundering or mail fraud was the object of the racketeering conspiracy" alleged in the indictment, the Eleventh Circuit vacated the sentences because the district court had found money laundering to be an object of the conspiracy by a preponderance of the evidence rather than beyond a reasonable doubt as required by U.S.S.G. § 1B1.2(d). *Id.* at 1060-61.

---

assessment, is reviewable only for "clear error." *See United States v. Gotti*, 459 F.3d 296, 349 (2d Cir. 2006).

Here, the courts below rejected Petitioner's argument, in reliance on *Farese*, that a racketeering act not found proven by the jury must be treated by the sentencing judge as an element of the offense under the beyond a reasonable doubt standard in U.S.S.G. § 1B1.2(d), not as "relevant conduct" under the preponderance of evidence standard in U.S.S.G. § 1B1.3(a). (App. 34-36)

11. For purposes of determining the applicable Guideline for a conspiracy with multiple objects, U.S.S.G. § 1B1.2(d) provides that a "conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." In other words, the applicable Guideline is not determined by treating different objects of the conspiracy as "relevant conduct" under U.S.S.G. § 1B1.3(a), which Guideline by its own terms applies "[u]nless otherwise specified," but by the direction "otherwise specified" in U.S.S.G. § 1B1.2(d), i.e., "as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." *See United States v. Aderholt*, 87 F.3d 740, 744 (5th Cir. 1996) (unlike in U.S.S.G. § 1B1.3, where "offense" is defined to include offense of conviction and all relevant conduct, in U.S.S.G. § 1B1.2(d) "offense" does not include relevant conduct).

Here, the court of appeals, in holding that the district court properly applied the preponderance of evidence standard, notwithstanding U.S.S.G. § 1B1.2(d),

reasoned that RICO conspiracy is not a multiple-object conspiracy, but has single-object: to violate 18 U.S.C. § 1962(c). (App. 34) The court expressly rejected the Eleventh Circuit's contrary holding in *Farese*, and followed the holdings of the First and Sixth Circuits, in *United States v. Carrozza*, 4 F.3d 70 (1st Cir. 1993), and *United States v. Corrado*, 227 F.3d 528 (6th Cir. 2000), respectively. (App. 34-36)

The court of appeals, however, overlooked the fact that, while RICO conspiracy does in fact have a single objective, the Guidelines themselves treat RICO *as if* it were a multiple object conspiracy. The Guideline for RICO conspiracy, U.S.S.G. § 2E1.1, provides that the base offense level is 19 or "the offense level applicable to *the underlying racketeering activity*." (Emphasis added.) Application Note 1 to the § 2E1.1 states in pertinent part that "[w]here there is more than one underlying offense, treat each underlying offense as if contained in a separate count of conviction." Accordingly, since the Guidelines treat RICO conspiracy as if it were a multiple object conspiracy, U.S.S.G. § 1B1.2(d) – which governs a "conviction on a count charging a conspiracy to commit more than one offense" – is fairly made applicable to RICO conspiracy.

Certiorari should therefore be granted to resolve this conflict among the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
February 16, 2009

Respectfully submitted,

DIARMUID WHITE
Counsel of Record
BRENDAN WHITE
WHITE & WHITE
148 East 78th Street
New York, NY 10075
(212) 861-9850

Attorneys for Petitioner

UNITED STATES OF AMERICA, Appellee, - v. - MICHAEL YANNOTTI, Defendant-Appellant.

Docket No. 06-5571-cr

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

541 F.3d 112; 2008 U.S. App. LEXIS 18820; 77 Fed. R. Evid. Serv. (Callaghan) 500

December 20, 2007, Argued
September 4, 2008, Decided

PRIOR HISTORY:

Appeal from a judgment of conviction in the United States District Court for the Southern District of New York (Scheindlin, J.) for racketeering conspiracy. *See* 18 U.S.C. § 1962(d).

United States v. Yannotti, 399 F. Supp. 2d 268, 2005 U.S. Dist. LEXIS 10015 (S.D.N.Y., 2005)

United States v. Yannotti, 415 F. Supp. 2d 280, 2005 U.S. Dist. LEXIS 37825 (S.D.N.Y., 2005)

DISPOSITION: Affirmed.

COUNSEL: DIARMUID WHITE, White & White (Brendan White, on the brief), New York, N.Y., for Defendant-Appellant.

ELIE HONIG, Assistant United States Attorney (Katherine Polk Failla, on the brief), for Michael J. Garcia, United States Attorney for the Southern District of New York, New York, N.Y., for Appellee.

JUDGES: Before: KATZMANN, B.D. PARKER, and RAGGI, Circuit Judges.

OPINION BY: BARRINGTON D. PARKER

OPINION

BARRINGTON D. PARKER, Circuit Judge:

Michael Yannotti appeals from a judgment of conviction in the United States District Court for the Southern District of New York (Scheindlin, J.). The jury convicted him of conspiring to engage in racketeering in violation of the Racketeer Influenced and Corrupt Organizations ("RICO") Act. *See* 18 U.S.C. § 1962(d). The district court sentenced Yannotti principally to 240 months' incarceration. Yannotti's appeal raises several issues. We consider whether one of the counts of conviction was time-barred, whether the district court properly admitted certain intercepted communications, and whether the evidence was sufficient to support his conviction for racketeering conspiracy. We also review the reasonableness of his sentence. We affirm.

BACKGROUND

On July 21, 2004, the government indicted Yannotti and his co-defendants, John Gotti Jr. and Louis Mariani, alleging that they were members of the

Gambino Crime Family,[1] a racketeering enterprise that engaged in, *inter alia,* extortion, extortionate extensions of credit, securities fraud, as well as violent conduct including murder.[2] Specifically, Yannotti was charged with a substantive count of racketeering in Count One and with participating in a RICO conspiracy that existed from the mid 1990s through 2004 in Count Two. *See* 18 U.S.C. § 1962(c), (d). Count One specifically charged Yannotti with participation in four separate predicate acts: Racketeering Act One charged Yannotti with conspiring to kidnap, kidnaping and attempting to murder Curtis Sliwa; Act Two charged Yannotti with conspiring to murder and murdering Robert Arena, and murdering Thomas Marenga; Act Three charged Yannotti with attempting to murder Robert Tarantola and Act Seven charged Yannotti with loansharking, specifically conspiring to make and collect extortionate extensions of credit throughout the 1990s. The aforementioned predicate acts were incorporated by reference in Count Two, along with several other predicate acts, including securities fraud and extortion in the

---

[1] The indictment alleges that the Gambino Family operated through groups of individuals known as "crews." Each "crew" was headed by a "capo" or "captain," and consisted of "made" members who were also known as "soldiers."

[2] The jury failed to reach a verdict as to Gotti on three of the four counts naming him and acquitted him on one count. Following two subsequent mistrials, the government dismissed the remaining charges against him. Mariani was convicted on several counts. He was sentenced principally to 78 months' imprisonment.

construction industry, allegedly committed by Yannotti's co-defendants in furtherance of the enterprise's affairs. Yannotti was also charged with murdering Arena and Marenga in aid of racketeering in Counts Nine and Ten.

The government's proof at trial included testimony from several members and associates of the Gambino Crime Family, as well as from law enforcement officers. These witnesses described Yannotti's criminal activities as an associate of Family member Nicholas Corozzo, whose crew was based in the Canarsie section of Brooklyn. In addition to Yannotti's loansharking activity, the government offered proof, primarily thorough Gambino Family associate Andrew DiDonato, that Yannotti was involved in the 1987 shooting of Robert Tarantola, an associate of the Colombo Crime Family, a rival criminal enterprise. Gambino Family captain Michael DiLeonardo and soldier Joseph D'Angelo testified about Yannotti's involvement in a 1992 conspiracy to abduct and murder Curtis Sliwa, a radio host and founder of the Guardian Angels, in retaliation for his public criticism of John Gotti, Sr., then head of the Gambino Family. Finally, DiDonato and DiLeonardo testified that in 1996, Yannotti shot Robert Arena and Thomas Marenga as a result of a conflict between Yannotti's crew and members of the Lucchese Crime Family, a rival criminal enterprise. In addition to testimonial evidence, the government offered surveillance photographs, a beeper recovered at the scene of the Arena and Marenga murders, records indicating that the

beeper belonging to Yannotti, recorded conversations between Yannotti and his loansharking customers, and additional loansharking records.

During trial, two evidentiary issues arose that figure in this appeal. The first concerned the admissibility of certain evidence secured as a result of a 1996 court authorized wiretap of a cellular phone used by Corozzo and his associates in Florida. The affidavit in support of the application averred that the phone was being used by Corozzo and "others yet unknown" in furtherance of a racketeering conspiracy that engaged in loansharking and money laundering, largely in New York. While the affidavit sought authorization to intercept conversations of Corozzo and several other named individuals, it did not identify Yannotti among the anticipated interceptees. It did, however, state that probable cause existed to suspect that "unknown others" used the phone while engaging in illegal activity.

On April 22, 1996, the day that the application was approved, Corozzo left the cell phone that was the subject of the application in Florida and returned to New York. The next day, the FBI intercepted its first phone call from Yannotti made on the target phone. The government's initial ten-day progress report to the judge supervising the wiretap described two phone calls made by Yannotti involving the collection of loansharking debts. The report explained that "Michael Yannotti will be identified as a named interceptee [on the wiretap application] if an extension affidavit is filed in this case." Finally, the

government informed the judge that it believed that the phone would continue to be used by Yannotti, Corozzo, and unnamed others to discuss the offenses described in the initial authorizing order. The government never intercepted any phone calls from Corozzo or sought an extension of the wiretap, thus, Yannotti was never formally named in the authorization. *See United States v. Yannotti,* 399 F. Supp. 2d 268, 270 (S.D.N.Y. 2005).

Before the start of the trial, Yannotti moved to suppress the two calls on the ground that the agents had exceeded their authority in continuing to intercept calls well after learning that Corozzo no longer possessed the phone. He argued that the agents were required to seek new authorization to intercept his conversations and that the continued interception converted the initial authorization into a general warrant proscribed by the Fourth Amendment. The district court disagreed, pointing to the fact that the initial order permitted the interception not only of Corozzo and others specifically named in the authorization, but also "others yet unknown", and consequently was not limited to the interception of calls placed by Corozzo himself. *Yannotti,* 399 F. Supp. 2d at 273. The court concluded that due to the easy mobility of cellular phones, the government was not required to seek a new authorization each time that a new person used the phone. Additionally, the government reasonably believed that the phone would continue to be used as an instrument of the charged conspiracy while in Yannotti's possession. *Id.* For

these reasons, the court concluded that the scope of the warrant and the reasonableness of the government's conduct posed no constitutional problems.

The second evidentiary issue relevant to this appeal concerned the admissibility of certain lay opinion testimony and poses the question whether Andrew DiDonato, a government witness, was properly allowed to interpret the two intercepted conversations involving Yannotti. DiDonato first testified about his participation, and assistance to Yannotti, in the loansharking conspiracy. He then explained that individuals who received extortionate loans usually made weekly payments on the interest rather than on the principal and that the interest was usually termed "points" by those involved in loansharking. In response to the government's question about the meaning of a loansharking victim's statement to Yannotti that "I'm going to leave you a two," DiDonato testified that it meant "200 dollars" in interest. DiDonato also testified that the intercepted conversations consisted of Yannotti seeking to collect a debt from an individual who was "backed up on his payments."[3] Over objection, the court admitted this

---

[3] The conversation that DiDonato was asked to interpret is as follows:

YANNOTTI: Your [sic] way behind here.

. . . .

ANDY: You got a calendar there?

YANNOTTI: Not on me, but, uh, look, Monday's gonna be six.

(Continued on following page)

ANDY: Okay.

YANNOTTI: Altogether. What does that look like to you?

. . . .

ANDY: I'll call him by tomorrow and I'll get together with him, and uh . . . I'll see him . . . I'll see him with six.

YANNOTTI: Alright, then you're good 'till for three weeks. So three Monday's from now. . . .

ANDY: And then that'll leave us with what? Four?

YANNOTTI: Two. . . .

YANNOTTI: This . . . this Monday coming up will be six.

ANDY: Okay.

YANNOTTI: Alright, so then you're fresh 'till, you know. . . .

At trial, the government asked DiDonato to describe what he had heard occur during the taped conversation:

GOVERNMENT: And when they're talking about getting calendars out, what is your understanding of what Michael Yannotti is telling this person named Drew or Andy?

. . . .

DIDONATO: That he's backed up on his payments

GOVERNMENT: What do you base that on?

DIDONATO: I base that on coming this week will be six, then based on the other information here that said, well, after this, after you pay the six you'll be starting off fresh, and looks like it's three weeks. So to me it looks like a $200 a week interval.

[DEFENSE COUNSEL]: That is for the jury to determine.

(Continued on following page)

testimony after determining that DiDonato acquired his understanding of the conversation through personal experience with loansharking. *See* Fed. R. Evid. 701.

At the conclusion of the government's case, Yannotti moved for a judgment of acquittal on Counts One and Two pursuant to Federal Rule of Criminal Procedure 29(a), arguing that the government had presented insufficient evidence of his guilt. Further, he asserted that there was insufficient proof that he had committed any predicate acts within the five-year statute of limitations period. Yannotti claimed that most of the predicate acts alleged violent conduct taking place in 1987, 1992, and 1996, all of which fell well outside of the statute of limitations. *See* 18 U.S.C. § 3282(a) ("[N]o person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found . . . within five years next after such offense shall have been committed."). With respect to the loansharking conspiracy, which was alleged to have continued from 1993 to 2002, Yannotti

---

. . . .

GOVERNMENT: Are you familiar with that term that Yannotti used, so all right, then you're fresh, if you give him six now you're fresh until, you know. Do you know what that term fresh means used in this context?

DIDONATO: Not that particular term per se, but to me it means he'll be even and won't own any back money and he'll be fresh to start again and start a new week off.

argued that the evidence was insufficient to show either (1) that he participated in the conspiracy or (2) that the conspiracy continued into the limitations period. The district court denied his motion.

The jury convicted Yannotti of engaging in the RICO conspiracy described in Count Two but could not reach a verdict on the substantive RICO count described in Count One. On its verdict sheet, the jury indicated that the government had proved that Yannotti conspired to engage in loansharking, but had not proven the other racketeering predicate acts – the conspiracy to murder Arena, the murders of Arena and Marenga, or the attempted murder of Tarantola. With respect to the racketeering act charging Yannotti with conspiring to kidnap, kidnaping, and attempting to murder Curtis Sliwa, the jury found that the attempted murder was not proven, but could not agree on whether the government proved the alleged conspiracy to kidnap or Yannotti's involvement in the kidnaping. The jury also acquitted Yannotti of the two counts alleging violent conduct in aid of racketeering.

Following trial, the district court granted Yannotti's renewed motion under Rule 29(c) for a judgment of acquittal as to Count One. The court concluded that because there was insufficient evidence that Yannotti had participated in loansharking after 1999, the loansharking conspiracy – the only predicate act for which Yannotti had been found

guilty – actually fell outside of the five-year statute of limitations.[4] *United States v. Yannotti,* 415 F. Supp. 2d 280, 289 (S.D.N.Y. 2005). The district court specifically found that the government had not proven that Yannotti was involved in any loansharking activity after 1996 given that "[t]here were no recorded conversations concerning loansharking after 1996, nor were any loansharking records found on Yannotti at any time after 1996. Furthermore, Yannotti's coconspirators . . . who, under the Government's own theory, provided Yannotti with loansharking money, were arrested in December 1996, and were incarcerated for many years thereafter." *Id.* at 288-89.

The government contended that the statute of limitations as to the substantive RICO conduct had not expired because it was entitled to a presumption that Yannotti's involvement in the charged conspiracy continued until he demonstrated his withdrawal from, or abandonment of, that conspiracy, citing *United States v. Spero,* 331 F.3d 57, 61 (2d Cir. 2003). The district court disagreed, finding that this presumption could not continue indefinitely and that the government failed to demonstrate that any of the conspirators engaged in loansharking on any date

---

[4] As the district court noted, it was undisputed by the parties that the other predicate acts alleged against Yannotti – the conduct involving Arena, Marenga, Sliwa and Tarantola – fell outside of the statute of limitations. *United States v. Yannotti,* 415 F. Supp. 2d 280, 284 (S.D.N.Y. 2005).

close to the limitations period. *Yannotti,* 415 F. Supp. 2d at 290. The court concluded that "[g]iven the facts presented here – the length of the presumption, the proof that the co-conspirators in all likelihood could not have continued with their illegal activities, and the absence of proof regarding Yannotti's loansharking activities within the limitations period . . . – the presumption alone is insufficient to sustain a conviction." *Id.* at 291. For these reasons, the district court dismissed Count One.[5]

However, the court denied Yannotti's Rule 29(c) motion as to Count Two charging him with participating in the RICO conspiracy. Yannotti argued that because the predicate acts alleged against him fell outside of the statute of limitations, the government could not claim that he timely participated in the conspiracy. The district court nevertheless determined that the evidence established that "the activities of the Gambino Organized Crime Family continued into the limitations period[,] . . . that Yannotti was a member of the conspiracy" and that there was no evidence that Yannotti withdrew from the conspiracy. *Id.* at 292 (citing *United States v. Persico,* 832 F.2d 705, 713 (2d Cir. 1987) ("In order to convict a defendant of RICO conspiracy, only an agreement to commit two or more predicate acts, *rather than the acts themselves,* need be proven."

---

[5] Because the government does not appeal the dismissal of Count One, we do not review the district court's analysis of the legal insufficiency of the trial evidence as to this count.

(emphasis added))). The court found that the government had offered sufficient proof that certain activities furthering the goals of the RICO conspiracy, specifically the charged predicate acts of securities fraud and construction industry extortion by other members of the enterprise, continued through 2002 and that Yannotti was responsible for the conduct of his co-conspirators. *Id.* Thus, it held that Yannotti was not entitled to a judgment of acquittal despite not being charged himself with the actual commission of timely racketeering acts.

The district court sentenced Yannotti in November 2006 and concluded that conduct which the jury had not found proven by the government should, nevertheless, be considered in calculating his applicable Guidelines range. The court acknowledged that the jury was unable to reach a verdict on the charges surrounding the Sliwa assault and that it "was deeply split on the issue with seven jurors out of twelve believing that there was proof beyond a reasonable doubt." However, the court determined that because one of the prosecution's witnesses on this point was credible and corroborated by another, only slightly less credible, witness, Yannotti's participation in the attack on Sliwa was supported by a preponderance of the evidence. Thus, Yannotti's involvement in the Sliwa activity could be considered relevant conduct for sentencing purposes. Based on this finding, the court calculated Yannotti's offense level at 36 and his

Criminal History Category at Level II, resulting in a Guidelines range of 210 to 262 months.[6] It then sentenced him to the statutory maximum of 240 months' imprisonment, noting that Yannotti had been a long-time associate of the Gambino Family and had engaged in extensive illegal and violent conduct in furtherance of that enterprise. This appeal followed.

DISCUSSION

Yannotti appeals his conviction and sentence on various grounds. He maintains principally that the evidence was not legally sufficient to establish his conviction for RICO conspiracy, the district court erred in admitting the contents of two intercepted phone calls and allowing a witness to interpret those phone calls, one of the racketeering acts alleged in the indictment was improperly vague, and the district court erred in rendering his sentence. We review *de novo* a challenge to the sufficiency of the evidence and "affirm if the evidence, when viewed in its totality and in the light most favorable to the government, would permit any rational jury to find the essential

---

[6] The district court calculated Yannotti's base offense level as 32 for the kidnaping of Sliwa pursuant to U.S.S.G. § 2A4.1(a). It then enhanced the offense determination by four levels pursuant to U.S. S.G. § 2A4.1(b)(2) because the victim sustained life threatening bodily injury. After determining that the kidnaping resulted in the higher offense level in comparison with the other criminal conduct, the district court concluded that the level 36 calculation should stand.

elements of the crime beyond a reasonable doubt." *United States v. Geibel,* 369 F.3d 682, 689 (2d Cir. 2004). A defendant challenging his conviction on the basis of the insufficiency of the evidence "bears a heavy burden." *United States v. Henry,* 325 F.3d 93, 103 (2d Cir. 2003). Evidentiary rulings are reviewed for abuse of discretion. *United States v. Taubman,* 297 F.3d 161, 164 (2d Cir. 2002). A district court's factual findings are reviewed for clear error. *United States v. Selioutsky,* 409 F.3d 114, 119 (2d Cir. 2005). The denial of a motion to dismiss the indictment is reviewed *de novo. United States v. Yousef,* 327 F.3d 56, 137 (2d Cir. 2003). Finally, we review a district court's sentence for its procedural and substantive reasonableness. *See Gall v. United States,* 128 S. Ct. 586, 594-97, 169 L. Ed. 2d 445 (2007); *see also United States v. Rattoballi,* 452 F.3d 127, 131-32 (2d Cir. 2006).

I.

Yannotti first contends that the evidence supporting his conviction for participating in a RICO conspiracy was legally insufficient. He asserts that he was not a member of the charged RICO conspiracy which, he maintains, was defined by the pattern of racketeering alleged in the indictment. Because there was no evidence that Yannotti engaged in the two timely acts of racketeering found proved by the jury –

securities or construction industry fraud[7] – and because the sole racketeering act committed by him – loansharking – fell outside the statute of limitations, Yannotti maintains that the district court erred in sustaining his RICO conspiracy conviction. He complains that, as support for its denial of his Rule 29(c) motion as to Count Two, the district court improperly treated his alleged membership in the criminal enterprise – the Gambino Family – as equivalent to membership in the charged conspiracy. Because the RICO conspiracy was limited to specific predicate acts and involved conduct committed by Gambino Family members to further their self-interests rather than the affairs "of any cohesive Gambino family enterprise," Yannotti argues that he should not be held liable for the acts of his co-conspirators.

The government renews its argument that it is entitled to the presumption, first articulated in *United States v. Spero,* that once the existence of the RICO conspiracy and Yannotti's membership in that conspiracy were established, Yannotti's involvement continued until he proved that he either withdrew from the conspiracy or it terminated. *See Spero,* 331 F.3d at 61. Additionally, the government maintains that even if we do not apply the *Spero* presumption, the evidence established that Yannotti participated in numerous racketeering activities attributable to the

---

[7] It is uncontested that this conduct occurred within the limitations period.

enterprise and any lack of Yannotti's involvement in the timely predicate acts alleged against his co-conspirators is not dispositive of his connection to the conspiracy.

In assessing Yannotti's sufficiency challenge, we are guided by precedent that undermines Yannotti's core argument that his conviction for RICO conspiracy cannot stand absent proof of his personal involvement in a timely charged predicate act. We discuss this precedent at the outset.

In *United States v. Persico,* we emphasized that "the agreement proscribed by section 1962(d) is [a] conspiracy to participate in a charged enterprise's affairs, not [a] conspiracy to commit predicate acts." 832 F.2d at 713. To establish a RICO conspiracy, the government must prove that a defendant agreed to participate in the affairs of the enterprise through a pattern of racketeering activity. However, in *Salinas v. United States,* 522 U.S. 52, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997), the Supreme Court made clear that to establish this pattern, the government need not prove that the defendant himself agreed that he would commit two or more predicate acts. *See id.* at 64 (noting that, although the RICO statute "broadened conspiracy coverage by omitting the requirement of an overt act; it did not, at the same time, work the radical change of requiring the Government to prove [that] each conspirator agreed that he would be the one to commit two predicate acts"). Indeed, *Salinas* held that to be found guilty of RICO conspiracy, a defendant need only know of, and agree to, the

general criminal objective of a jointly undertaken scheme. *See id.* at 63; *see also United States v. Ciccone,* 312 F.3d 535, 542 (2d Cir. 2002) (stating that "a conspirator charged with racketeering conspiracy need not commit or even agree to commit the predicate acts . . . to be found guilty of the racketeering conspiracy, for it suffices that he adopt[ ] the goal of furthering or facilitating the criminal endeavor" (internal citations and quotations marks omitted)).

It is well-settled that a conspirator need not be fully informed about his co-conspirators' specific criminal acts provided that he agreed to participate in the broader criminal conspiracy and the acts evincing participation were not outside of the scope of the illegal agreement. "A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. The partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other." *Salinas,* 522 U.S. at 63-64 (internal citation omitted); *see also United States v. Zichettello,* 208 F.3d 72, 100 (2d Cir. 2000) (holding that "no rule" requires "the government to prove that a [RICO] conspirator knew of all criminal acts by insiders in furtherance of the conspiracy" as long as it shows that defendant possessed knowledge of "the general contours of the conspiracy"); *United States v. Rastelli,* 870 F.2d 822, 828 (2d Cir. 1989) (stating that a defendant may agree to join a RICO conspiracy without knowing the identities of "all the other conspirators"

and without "full knowledge of all the details of the conspiracy").

With this precedent in mind, we reject Yannotti's argument that the evidence was insufficient to prove his participation in the charged RICO conspiracy. The government's proof convincingly established that the Gambino Crime Family was an enterprise whose members routinely conducted its affairs through a nearly limitless range of racketeering activities, including kidnaping, extortion, loansharking, and fraud. Yannotti does not dispute his membership in the Gambino Family. Rather, he asserts that the government's proof of his mid-1990s involvement in loansharking on behalf of the Gambino Family was insufficient to prove his agreement to the broader pattern of racketeering. The evidence, viewed in the light most favorable to the government, supports a different conclusion.

Specifically, the evidence showed that Yannotti was formally inducted as a "soldier" into the Gambino Crime Family at a ceremony in which inductees pledged themselves to use *any* means necessary to further the objectives of the Family. A reasonable jury could certainly conclude that when Yannotti agreed to participate in the affairs of the Gambino Family, he was by no means limiting that participation to his own loansharking. Instead, it could have found that Yannotti had agreed that he, and others, would engage in a jointly undertaken pattern of racketeering activities reaching all of the predicates established by the government. Thus, the fact that the

government did not prove Yannotti's specific knowledge of or participation in each predicate act conducted by other members of the Gambino Family does not undermine the sufficiency of the evidence establishing his conviction as to the charged RICO conspiracy. *See Salinas,* 522 U.S. at 63-64; *see also Ciccone,* 312 F.3d at 542; *Zichettello,* 208 F.3d at 99-100.

To the extent Yannotti maintains that, even if the government proved his involvement in the charged conspiracy, the statute of limitations required proof of his specific agreement to commit predicate acts within five years of indictment, he conflates our precedent with respect to substantive RICO and RICO conspiracy. Although a "substantive RICO charge is barred by limitations as to any defendant unless *that defendant* committed a predicate act within the five-year limitations period," a RICO conspiracy "is complete, thus commencing the running of the five-year statute of limitations, only when the purposes of the conspiracy have either been accomplished or abandoned." *United States v. Salerno,* 868 F.2d 524, 534 (2d Cir. 1989) (emphasis in original). Accordingly, even if a defendant engaged in predicate conduct that occurred outside of the statute of limitations, that defendant remains liable for RICO conspiracy unless the evidence shows that the conspiracy concluded or he withdrew from that conspiracy more than five years before the indictment. *See id.*; *Persico,* 832 F.2d at 713. This is because once the government meets its burden of proof to establish a

RICO conspiracy, "it is entitled to a presumption that the conspiracy continued until [the] defendant demonstrate[s] otherwise." *United States v. Spero*, 331 F.3d at 61.

Yannotti relies on our dicta in a footnote in *United States v. Bruno*, 383 F.3d 65 (2d Cir. 2004) to suggest that *Spero* does not control because his association with the Gambino Family, standing alone, is insufficient to toll the statute of limitations. In *Bruno*, we did not reach the issue of "what implications a defendant's continued membership in an ongoing organized crime family may have on the statute of limitations for a RICO conspiracy charge." *Id.* at 81 n.10. *Bruno* involved a count charging the defendant with a substantive RICO violation in which four of the five racketeering acts were committed outside of the limitations period and the defendants' conviction under the only timely act was unsupported by the evidence. *Id.* at 81. Here, however, the securities fraud and construction extortion conspiracies established the charged RICO conspiracy's continuation well into the limitations period, and Yannotti does not challenge the evidence proving those predicates. Further, for the reasons just discussed, the evidence permitted a reasonable jury to conclude that these timely predicate acts by co-conspirators fell within the broad pattern of racketeering activity through which Yannotti agreed that he and others would conduct the affairs of the enterprise. Under these circumstances, and in the absence of any evidence of Yannotti's timely withdrawal, we conclude

that the statute of limitations does not preclude Yannotti's conviction for RICO conspiracy.

II.

Yannotti also complains that the district court improperly admitted his phone conversations because the government's original wiretap application did not specifically name him as a target. As previously noted, although the government was authorized to intercept communications on a cell phone belonging to Corozzo, that authorization did not specifically identify Yannotti. The government intercepted two calls in which Yannotti discussed his loansharking activities. Yannotti maintains that this evidence, which he argued was inadmissible, served as the government's sole proof connecting him to the predicate act alleging loansharking.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 provides for court-ordered interceptions of communications. 18 U.S.C. § 2518. The statute allows a court to authorize a wiretap "if it determines, on the basis of the facts submitted by the applicant, that there is probable cause to believe (1) that an individual was committing, had committed, or is about to commit a crime; (2) that communications concerning that crime will be obtained through the wiretap; and (3) that the premises to be wiretapped were being used for criminal purposes or are about to be used or owned by the target of the wiretap." *United States v. Diaz,* 176 F.3d 52, 110 (2d Cir. 1999).

Intercepted communications are inadmissible if they were "unlawfully intercepted," intercepted pursuant to an authorization or approval that is "insufficient on its face," or intercepted not in conformity "with the order of authorization or approval." 18 U.S.C. § 2518(10)(a). "In reviewing a ruling on a motion to suppress wiretap evidence, we accord deference to the district court." Because our role as an appeals court in reviewing the issuance of a wiretap order "is not to make a *de novo* determination of sufficiency as if it were a district judge, but to decide if the facts set forth in the application were minimally adequate to support the determination that was made." *United States v. Miller,* 116 F.3d 641, 663 (2d Cir. 1997) (internal quotation marks and brackets omitted) (alterations and omissions in original).

Given this deference, we find no error in the admission of the conversations. The affidavit in support of the application did not solely request the interception of communications made to and by Corozzo. Instead, it named Corozzo, six alleged associates and members of the Gambino family, and "others as yet unknown." In authorizing the interceptions, the court determined that probable cause existed to believe that not only Corozzo, but also other unnamed targets, would use the cellular phone to engage in illegal activities. The government is not required to specify in the application each individual whose conversations may be intercepted. Where, as here, the government is investigating numerous members of an extensive criminal conspiracy, the

government may not be able to identify in advance each person who will use the phone for criminal purposes. In *United States v. Figueroa*, we held that "[a]t the outset of a wiretap, surveillance under an order that authorizes interception of calls of 'others as yet unknown' is not strictly limited to only those who are specifically named in the authorizing order either as probable violators or as possible interceptees."; Instead, "[t]he agents are required only to make reasonable efforts to minimize their interceptions in light of all the relevant circumstances." 757 F.2d 466, 473 (2d Cir. 1985). Here, the order limited interception to conversations which addressed conspiratorial activities and terminated "upon the attainment of authorized objectives" or at the end of the thirty days; thus, it did not, as Yannotti avers, give the government unfettered discretion to intercept phone calls unrelated to the alleged conspiracy. Moreover, the order also required the government to submit regular reports to the supervising judge "showing what progress has been made toward achievement of the authorized objectives and the need for continued interception." These restrictions were adequate safeguards that foreclosed the possibility that the order could be transformed into a general warrant.

Additionally, the government had no reason to believe that Yannotti would indefinitely maintain possession of the cell phone. Consequently, it acted reasonably in suspecting that Corozzo would return to Florida and re-claim his phone. Regardless, as the government stated in its progress report, it suspected

that Yannotti's intercepted conversation indicated that he had used the phone in furtherance of the criminal activity identified in the initial application. Thus, as the district court reasonably found, "although Corozzo no longer possessed the phone, there was probable cause to believe that it remained an instrumentality of the alleged conspiracy." *Yannotti,* 399 F. Supp. 2d at 273. Under these circumstances, we agree with the district court's conclusion that the government did not exceed the wiretap authorization in its continued interception of Yannotti's calls.

III.

Yannotti next asserts that Andrew DiDonato, a government witness, provided inadmissible opinion testimony which did not conform to the definition of lay testimony under Federal Rule of Evidence 701 because it was based on DiDonato's specialized knowledge as a member of the Gambino Crime Family. DiDonato was allowed to testify about comments made by Yannotti during the two intercepted phone conversations. Yannotti complains that the government did not seek to admit this testimony as expert opinion testimony under Rule 702 and that he was not afforded the protections provided by Federal Rule of Criminal Procedure 16(a)(1)(G). The government, on the other hand, claims that DiDonato was not an expert as contemplated by Rule 702 because he acquired his particular knowledge about loansharking through experience as a member of the

conspiracy, rather than through specialized study or training.

Under Rule 701, a lay witness' testimony "in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. A rational perception is one involving "first-hand knowledge or observation." *United States v. Rea*, 958 F.2d 1206, 1215 (2d Cir. 1992). The advisory note to the 2000 Amendments to Rule 701 provides that "most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an . . . expert. . . . Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business." Fed. R. Evid. 701, advisory committee's note. In contrast under Rule 702, a witness purporting to offer expert opinion testimony must be first qualified to offer this testimony on the basis of his knowledge, skill, or education. Fed. R. Evid. 702.

Although Yannotti challenges the admissibility of DiDonato's testimony under Rule 701 only on the ground that it derived from specialized knowledge in contravention of the third requirement under Rule

701, we conclude that DiDonato's testimony easily met both the first and second requirements under Rule 701, which are that the testimony be "rationally based on the perception of the witness" and "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." *Id.*

First, DiDonato's testimony was rationally based on his own perception because it derived from his direct participation in the loansharking activities of the charged enterprise, not on participation in the loansharking activities of some unrelated criminal scheme.[8] Second, there is little question that DiDonato's testimony was helpful to the jury. As we have explained in another context, individuals engaging in illicit activities rarely describe their transactions in an open or transparent manner and the government may call witnesses to provide insight into coded language through lay opinion testimony. *See United States v. Garcia,* 291 F.3d 127, 139 (2d Cir. 2002). The conversation between Yannotti and the individual

---

[8] This distinction applies equally to evaluating the admissibility of agent testimony. An undercover agent whose infiltration of a criminal scheme has afforded him particular perceptions of its methods of operation may offer helpful lay opinion testimony under Rule 701 even as to co-conspirators' actions that he did not witness directly. By contrast, an investigative agent who offers an opinion about the conduct or statements of conspirators based on his general knowledge of similar conduct learned through other investigations, review of intelligence reports, or other special training, does not meet the requirements of Rule 701 and must qualify as an expert pursuant to Rule 702. *See United States v. Garcia,* 413 F.3d 201, 216 (2d Cir. 2005).

identified by the government as "Andy" was cryptic and required interpretation. As discussed earlier, DiDonato explained that the individual collecting the debts informed the loansharking victim about the amount of the weekly interest by referring to a single number or "points." DiDonato stated that in the phone call with "Andy," Yannotti was seeking exorbitant amounts of interest at regular intervals ranging from two hundred to six hundred dollars. Given its discretion in such matters, the district court did not err in allowing DiDonato to provide interpretative testimony because the "language on the tape [was] . . . punctuated with ambiguous references to events that are clear only to the conversants." *United States v. Aiello,* 864 F.2d 257, 265 (2d Cir. 1988) (internal quotation marks and alterations omitted). Accordingly, we find that DiDonato's testimony met the requirements of Rule 701 and was properly admitted as lay opinion testimony.

Mindful of making explicit the requirements for lay witness testimony in comparison to expert testimony, we now conclude that where a witness derives his opinion solely from insider perceptions of a conspiracy of which he was a member, he may share his perspective as to aspects of the scheme about which he has gained knowledge as a lay witness subject to Rule 701, not as an expert subject to Rule 702. *See United States v. Rigas,* 490 F.3d 208, 225 (2d Cir. 2007) (concluding the district court did not abuse its discretion in allowing a lay witness to testify about an organization's fraudulent financial conduct where

that witness made first-hand observations and was well aware of the organization's financial misstatements). No different conclusion is mandated by Rule 701's requirement that a lay opinion must be the product of "reasoning processes familiar to the average person in everyday life," and not "scientific, technical, or other specialized knowledge." *United States v. Garcia,* 413 F.3d 201, 216-17 (2d Cir. 2005). While we do not profess that loansharking is an activity about which the average person has knowledge, we find that the opinion DiDonato reached from his own loansharking experience derived from a reasoning process familiar to average persons. In short, his opinion did not depend on the sort of specialized training that scientific witnesses or statisticians rely upon when interpreting the results of their own experiments or investigations.

IV.

Yannotti renews his pre-trial claim that subparts (b) and (c) of Racketeering Act Seven of the indictment[9] – charging him with financing extortionate

---

[9] The relevant portions of the indictment charged the following:

> (b) Conspiracy to Make Extortionate Extensions of Credit: From in or about 1993, up through and including in or about 2002, in the Southern District of New York, the Eastern District of New York, and elsewhere, Michael Yannotti . . . and others known and unknown, unlawfully, willfully, and knowingly combined, conspired, confederated, and agreed together

(Continued on following page)

extensions of credit and conspiring to make and collect extortionate extensions of credit – violated Federal Rule of Criminal Procedure 7(c) because they did not contain sufficient factual allegations. He maintains that those portions of the racketeering act failed to allege sufficient facts and included overly broad temporal and geographic spans by describing conspiratorial conduct occurring in both the Southern and Eastern Districts of New York, and elsewhere with unnamed co-conspirators. The district court denied his motion to dismiss the racketeering act, citing language from *United States v. Walsh,* 194 F.3d 37, 44 (2d Cir. 1999) and concluded that the indictment adequately "track[ed] the language of the statute . . . and state[d] the time and place (in approximate terms) of the alleged crime."[10]

"An indictment is sufficient when it charges a crime with sufficient precision to inform the defendant of the charges he must meet and with enough

---

> and with each other to make extortionate extensions of credit; . . . (c) From in or about 1993, up through and including in or about 2002, in the Southern District of New York, the Eastern District of New York, and elsewhere, Michael Yannotti . . . and others known and unknown, unlawfully, willfully, and knowingly combined, conspired, confederated, and agreed together and with each other to participate in the use of extortionate means to collect and attempt to collect extensions of credit.

[10] Yannotti's pre-trial motion related to the inadequacy of the allegations provided in Racketeering Act Ten. The government subsequently renumbered this Act as Seven.

detail that he may plead double jeopardy in a future prosecution based on the same set of events." *United States v. Stavroulakis,* 952 F.2d 686, 693 (2d Cir. 1992). Moreover, "an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." *United States v. Alfonso,* 143 F.3d 772, 776 (2d Cir. 1998). Federal Rule of Criminal Procedure 7(c) requires only that an indictment be "a plain, concise, and definite written statement of the essential facts constituting the offense charged."

The contested portions of the racketeering act provided Yannotti with sufficient notice of the allegations regarding loansharking so that he could defend against those allegations in the instant prosecution and in any future prosecutions. Additionally, the government provided Yannotti with discovery, including the tapes, records, and names of participants associated with the loansharking conspiracy. Yannotti was well aware of the government's theory of the loansharking conspiracy as well as the identities of any victims and co-conspirators, even if that information was not pled in the indictment. Moreover, despite Yannotti's contentions, Racketeering Act Seven makes clear the nature of the criminal conduct, the time span, and the location where this conduct occurred. Since Rule 7(c) requires no more, we find that the allegations in the indictment are sufficient.

V.

Finally, Yannotti challenges the sentence imposed by the district court as unreasonable because it was based on the court's unsubstantiated finding that he committed the kidnaping and attempted murder of Curtis Sliwa alleged in Racketeering Act One. The jury found that the government had not proven Yannotti's involvement in Sliwa's attempted murder, but could not agree on whether the government had proven his participation in the conspiracy to kidnap or the kidnaping of Sliwa. The jury also found unproven all of the other charged racketeering acts with the exception of Racketeering Act Seven – the loansharking conspiracy.

In calculating the sentence under the now advisory Sentencing Guidelines, the Probation Officer determined in the Presentence Investigation Report that Yannotti's base offense level for his racketeering conspiracy conviction was 19 pursuant to U.S.S.G. § 2E1.1(a)(1), leaving to the discretion of the district court any application of relevant conduct adduced at trial. The Probation Officer further calculated his Guidelines range as 37-46 months' imprisonment and recommended a sentence of 41 months. During the sentencing proceeding, in response to the court's question about the impact of relevant conduct on Yannotti's sentence, defense counsel requested that conduct found unproven by the jury not be reviewed by the court. The government retorted that all conduct presented at trial could be considered, given the credibility of its witnesses as well as the multitude of

evidence established concerning Yannotti's participation in the Sliwa kidnaping. The district court ultimately found that this activity, while not proved to the satisfaction of a unanimous jury, had nonetheless been established by a preponderance of the evidence and could be factored into Yannotti's sentence as relevant conduct pursuant to U.S.S.G. § 1B1.3.

Yannotti contends that procedural error occurred in the sentencing court's approach. He argues that the jury's finding of his participation in the RICO conspiracy did not authorize the court, when determining his Sentencing Guidelines range, to place any weight on his involvement in the Sliwa assault. Moreover, he challenges the court's employment of a preponderance of the evidence, as opposed to a reasonable doubt, standard in finding him responsible for the Sliwa assault. In support, he points to U.S.S.G. § 1B1.2(d) which provides that a "conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." Yannotti argues that, in light of this provision, his Guidelines range for participation in a RICO conspiracy should be calculated based only on predicate conduct that a fact-finder found him to have engaged in beyond a reasonable doubt. We disagree with Yannotti on this issue of first impression in our circuit.

Yannotti's argument depends on a construction of U.S.S.G. § 1B1.2(d) that would require each predicate

act alleged as part of a RICO conspiracy to be treated as a separate object of the criminal agreement to be factored into a Sentencing Guidelines calculation only if that act was proved beyond a reasonable doubt. However, he improperly assumes that multiple racketeering predicates can transform a RICO conspiracy into the multi-object conspiracy referenced in U.S.S.G. § 1B1.2(d).

As Yannotti acknowledges, the RICO conspiracy with which he was charged had only one object – to conduct or participate in the affairs of the charged enterprise, the Gambino Crime Family, through a pattern of racketeering. *See* 18 U.S.C. § 1962(c), (d). While the intended pattern of this conspiracy may have involved a variety of criminal conduct, including construction fraud, loansharking, kidnaping, and attempted murder, the underlying objective of the conspiracy remained the singular one proscribed by § 1962(c). Indeed, to secure Yannotti's conviction for RICO conspiracy, the government was not required to prove the *actual* commission of a single predicate act by Yannotti or any other conspirator. *See Salinas,* 522 U.S. at 64 (noting that "[t]he RICO conspiracy statute, § 1962(d), broadened conspiracy coverage by omitting the requirement of an overt act"). The underlying predicate acts are relevant merely to establish the existence of the charged agreement among members of the conspiracy to conduct the affairs of the enterprise through a pattern of racketeering

conduct[11] and do not constitute separate criminal objectives. *See United States v. Corrado*, 227 F.3d 528, 542 (6th Cir. 2000). Because overt acts are not distinct offenses that must be proven to sustain a RICO conspiracy conviction, and the RICO conspiracy charged in this case is appropriately viewed as single-object conspiracy, we now join the First and Sixth Circuits in concluding that U.S.S.G. § 1B1.2(d) is

---

[11] Although the same predicate acts may be charged with respect to both substantive and RICO conspiracy counts, the jury inquiry may be different. In deciding whether a defendant is guilty of substantive RICO, the jury identifies predicate acts committed by that defendant to determine if he has himself conducted the affairs of the enterprise through a pattern of racketeering. However, in deciding whether a defendant is guilty of RICO conspiracy, the jury identifies whether the charged predicate acts were, or were intended to be, committed as part of that conspiracy. Thus, the jury must consider these acts to determine whether the co-conspirators, not solely the defendant, agreed to conduct the affairs of the enterprise through a pattern of racketeering. As stated previously, to prove a defendant's membership in the agreement, the government need not prove that the defendant committed or agreed to commit any of the charged predicate acts as long as the government proves that he participated in some manner in the overall objective of the conspiracy. *See Salinas*, 522 U.S. at 64; *see also* L. Sand, et al. Modern Federal Jury Instructions, (Criminal) Inst. 52-32 (2000) (providing that jury be instructed as to predicate acts charged in RICO conspiracy: "Again, the government must prove that two of these acts were, or were intended to be, committed as part of the conspiracy, although it need not prove that defendant committed or agreed to commit any of these acts as long as the government proves that defendant participated in some manner in the overall objective of the conspiracy.").

inapplicable.[12] *See Corrado,* 227 F.3d at 541; *United States v. Carrozza,* 4 F.3d 70, 79 (1st Cir. 1993). Thus, a sentencing court may consider predicate acts as relevant conduct under U.S.S.G. § 1 because their commission need not be proven beyond a reasonable doubt.

Given our finding that the predicate acts alleged against Yannotti do not require proof beyond a reasonable doubt to sustain his RICO conspiracy conviction, the kidnaping conduct was properly viewed by the district court as relevant conduct. We have consistently emphasized that a district court may consider all information adduced during trial, including acquitted conduct, when sentencing a defendant. *See United States v. Vaughn,* 430 F.3d 518, 526-27 (2d Cir. 2005). While a fact-finder is required to find guilt beyond a reasonable doubt, the sentencing court may find facts relevant to sentencing by the lower preponderance of the evidence standard. *Id.* Therefore, there was no clear error in the court concluding that based on a preponderance of the evidence, Yannotti's involvement in the assault on Sliwa could be taken into account in sentencing.

The district court was in the unique position to consider the credibility of the witnesses and to conclude, as it did, that two of the government's

---

[12] In so holding, we reject the approach taken by the Eleventh Circuit in *United States v. Farese,* 248 F.3d 1056, 1060-61 (11th Cir. 2001).

witnesses had been particularly credible in their testimony about Yannotti's participation in the Sliwa kidnaping. The court appropriately considered the Guidelines and the factors specified under 18 U.S.C. § 3553(a) and sentenced Yannotti within the Guidelines range. We conclude that Yannotti's sentence was both procedurally and substantively reasonable.

CONCLUSION

The judgment of the district court is affirmed.

UNITED STATES OF AMERICA, – against – MICHAEL YANNOTTI, Defendant.

04 CR 690 (SAS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

457 F. Supp. 2d 385*; *2006 U.S. Dist. LEXIS 51046

July 24, 2006, Decided
July 24, 2006, Filed

COUNSEL: For Defendant: Diarmuid White, Esq., White & White, New York, New Yok

For the Government: Victor L. Hou, Miriam Rocah, Assistant United States Attorneys, New York, New York.

JUDGES: Shira A. Scheindlin, U.S.D.J.

OPINION BY: Shira A. Scheindlin

OPINION

OPINION AND ORDER

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

By letters dated March 20, 2006 and May 8, 2006,[1] defendant Michael Yannotti moves for reconsideration of this Court's December 30, 2005 Opinion and Order ("Opinion") denying his motion for a judgment of acquittal on Count Two of Indictment S1 04 CR 690 (SAS) (the "Indictment"). Alternatively, in the event Yannotti's motion for reconsideration is denied, he moves for bail pending appeal. For the following reasons, Yannotti's motion for reconsideration is denied as is his motion for bail pending appeal.

A. The Verdict

On September 20, 2005, the jury unanimously found proven one of four predicate acts with which Yannotti was charged – conspiracy to make extortionate extensions of credit and collect extensions of credit through extortionate means in violation of the Racketeering Influenced and Corrupt Organizations Act ("RICO"). This was the fourth racketeering act (Racketeering Act # 7) in support of the RICO Substantive charge (Count One). The jury was unable to reach a verdict on Count One, however, having found the second and third predicate acts[2] not proven and

---

[1] These letters are from Diarmuid White, Yannotti's trial attorney.

[2] The second predicate act charged Yannotti with conspiracy to murder and the murder of Robert Arena as well as the murder of Thomas Maranga. The third predicate act charged Yannotti with the attempted murder of Robert Tarantola.

having deadlocked on the first predicate act.[3] Yannotti was convicted of Count Two, RICO Conspiracy.[4]

B. The Rule 29 Motion

Yannotti then moved for a judgment of acquittal on both RICO counts pursuant to Federal Rule of Criminal Procedure 29 ("Rule 29"). In an Opinion and Order dated December 30, 2005 (the "Opinion"), Yannotti's motion was granted as to Count One[5] but denied as to Count Two.[6] Yannotti's argument in

---

[3] The first predicate act charged Yannotti with conspiracy to kidnap, kidnaping, and the attempted murder of Curtis Sliwa, a radio talk show host who publicly criticized John Gotti, Sr., the father of co-defendant John A. Gotti, Jr. ("Gotti").

[4] Count Two charged that defendants conspired to conduct and participate, directly and indirectly, in the conduct of the affairs of the enterprise, the Gambino Organized Crime Family, through a pattern of racketeering activity set forth in paragraphs fourteen through twenty-four of the Indictment as Racketeering Acts One through Eleven. *See* Indictment ¶ 26.

[5] *See United States v. Yannotti*, 415 F. Supp. 2d 280, 291 (S.D.N.Y. 2005) ("There is simply no evidence in this record that any of the alleged co-conspirators engaged in loansharking during the limitations period. I therefore conclude that no reasonable jury could have found that Yannotti participated in that conspiracy after July 21, 1999. Count One of the Indictment is therefore dismissed pursuant to Rule 29.").

[6] *See id.* at 292 ("Viewed in the light most favorable to the Government, the Government proved beyond any reasonable doubt that the activities of the enterprise [the Gambino Organized Crime Family], through the pattern of racketeering activity charged in the Indictment, continued well into the limitations period.").

support of a judgment of acquittal on the RICO Conspiracy count can be summarized as follows:

> Yannotti argues that while the charged *enterprise* is the Gambino Organized Crime Family, the charged *conspiracy* is the agreement to participate in the conduct of the affairs of that enterprise through a pattern of racketeering activity, and that the enterprise and the conspiracy cannot be the same. Yannotti further argues that it is not enough for the Government to establish that the defendant continued to act *as a member of the alleged organized crime family* in order to satisfy the statute of limitations; the Government must establish that the defendant agreed to participate in the enterprise's affairs through the particular pattern of racketeering activity charged in the [I]ndictment. Finally, Yannotti concludes that if the evidence shows that he neither committed a charged predicate act within the five-year limitations period nor that he agreed to participate in the enterprise's affairs through the particular pattern of racketeering activity charged in the Indictment during that period, then the statute of limitations is not satisfied as to the RICO conspiracy count as well as the RICO substantive count.[7]

---

[7] *Yannotti*, 415 F. Supp. 2d at 291-92 (quotations, citations and footnotes omitted).

Despite the Government's failure to prove that the loansharking conspiracies charged as predicate acts in the RICO Substantive charge continued into the limitations period,[8] "there was substantial evidence that the conspiracy to commit extortion in the construction industry and the conspiracy to commit securities fraud extended well into the limitations period."[9] Having failed to withdraw from the overarching conspiracy to participate in the affairs of the Gambino Crime Family, Yannotti was held responsible for these activities even though he was not charged with these predicate acts.[10]

C. The Motion for Reconsideration

Yannotti now moves for reconsideration of his Rule 29 motion with regard to Count Two of the Indictment. In support of reconsideration, Yannotti alleges that this Court overlooked two Second Circuit cases, *United States v. Labat*[11] and *United States v. Bruno,*[12] which, he argues, invalidate this Court's decision upholding the RICO Conspiracy conviction. Despite the prohibition on repetition, Yannotti restates

---

[8] *See id.* at 292 ("There was more than sufficient evidence at trial to support the finding that the activities of the Gambino Organized Crime Family continued into the limitations period and that Yannotti was a member of that conspiracy.").

[9] *Id.*

[10] *See id.*

[11] 905 F.2d 18 (2d Cir. 1990).

[12] 383 F.3d 65 (2d Cir. 2004).

the following argument, first presented in his Rule 29 motion:

> [T]here was no evidence here that *Yannotti* was part of any RICO conspiracy whose objective was to conduct the affairs of an enterprise through a pattern of racketeering activity *that included the securities fraud conspiracy and construction industry extortion conspiracy* alleged to have been committed by codefendants, even if he had once been part of a narrower RICO conspiracy, *e.g.*, one relating to loansharking. Consequently, those racketeering acts could not have satisfied the statute of limitations as to Yannotti.

In sum, . . . if the evidence shows, as it does, that Yannotti neither committed a charged predicate act within the five-year limitations period nor was part of an agreement during that period to participate in the enterprise's affairs through the particular pattern of racketeering activity charged in this indictment, then the statute of limitations was not satisfied as to the RICO conspiracy count as well as the RICO substantive count.[13]

II. LEGAL STANDARD

"The standard to be applied in deciding reconsideration motions in criminal cases has not been clearly

---

[13] 5/8/06 Letter from Diarmuid White to the Court at 8 (emphasis in original).

established. Neither the Federal Rules of Criminal Procedure nor the Local Criminal Rules expressly provide for reconsideration motions."[14] However, motions for reconsideration in criminal cases have traditionally been allowed within the Second Circuit.[15] In deciding such motions, district courts have applied the standard found in Rule 6.3 of the Local Civil Rules of the United States District Courts for the Southern and Eastern Districts of New York ("Local Rule 6.3").[16] Accordingly, Local Rule 6.3 will be applied in deciding the instant motion.[17]

---

[14] *United States v. Mottley*, 2003 U.S. Dist. LEXIS 15643, No. 03 CR 303, 2003 WL 22083420, at *1 (S.D.N.Y. Sept. 9, 2003).

[15] *See United States v. Clark*, 984 F.2d 31, 33 (2d Cir. 1993) ("In *Healy* [376 U.S. 75, 84 S. Ct. 553, 11 L. Ed. 2d 527 (1964)] and *Dieter* [429 U.S. 6, 97 S. Ct. 18, 50 L. Ed. 2d 8 (1976)] the Supreme Court permitted the Government to seek reconsideration of a district court ruling dismissing an indictment in a criminal case despite the absence of any provision explicitly authorizing such reconsideration."). In so doing, the Supreme Court relied upon "'traditional and virtually unquestioned practice.'" *Dieter*, 429 U.S. at 8 n.3 (quoting *Healy*, 376 U.S. at 79).

[16] *See, e.g., United States v. Delvi*, 2004 U.S. Dist. LEXIS 1672, No. S12 01 CR 74, 2004 WL 235211 (S.D.N.Y. Feb. 6, 2004); *United States v. Greenfield*, 2001 U.S. Dist. LEXIS 16628, No. 01 CR 401, 2001 WL 1230538, at *1 (S.D.N.Y. Oct. 16, 2001) (applying Local Rule 6.3 standard in the interests of justice).

[17] Local Rule 6.3, Motions for Reconsideration or Reargument, provides, in pertinent part, as follows:

> A notice of motion for reconsideration or reargument of a court order determining a motion shall be served within ten (10) days after the entry of the

(Continued on following page)

The purpose of Local Rule 6.3 is to "'ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters.'"[18] Accordingly, a motion for reconsideration under Local Rule 6.3 will generally be denied unless "'the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.'" [19] Local Rule 6.3 is "'narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the Court.'"[20] The decision whether to grant

---

> court's determination of the original motion, or, in the case of a court order resulting in a judgment, within ten (10) days after the entry of the judgment. There shall be served with the notice of motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked.

U.S. Dist. Ct. Rules S. & E.D.N.Y., Civil Rule 6.3.

[18] *Naiman v. New York Univ. Hosps. Ctr.*, 2005 U.S. Dist. LEXIS 6817, No. 95 Civ. 6469, 2005 WL 926904, at *1 (S.D.N.Y. Apr. 21, 2005) (quoting *Carolco Pictures, Inc. v. Sirota*, 700 F. Supp. 169, 170 (S.D.N.Y. 1988)).

[19] *In re BDC 56 LLC*, 330 F.3d 111, 123 (2d Cir. 2003) (quoting *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995)).

[20] *Hammer v. First UNUM Life Ins. Co.*, 2005 U.S. Dist. LEXIS 3414, No. 01 Civ. 9307, 2005 WL 525445, at *2 (S.D.N.Y. Mar. 7, 2005) (quoting *DelleFave v. Access Temporaries, Inc.*, No. 99 Civ. 6098, 2001 WL 286771, at *1 (S.D.N.Y. Mar. 22, 2001)). *See also Koehler v. Bank of Bermuda Ltd.*, 2005 U.S. Dist. LEXIS 8694, No. M18-302, 2005 WL 1119371, at *1 (S.D.N.Y.

(Continued on following page)

or deny a motion for reconsideration is within the district court's sound discretion.[21]

III. DISCUSSION

A. Timeliness

"Local Rule 6.3 may have been promulgated with the intention that its application be limited to civil cases."[22] Nonetheless, "even if Local Rule 6.3 is not applicable to criminal cases . . . the standard for reconsideration underlying Rule 6.3 should apply to criminal cases."[23] Under Local Rule 6.3, a motion for reconsideration "shall be served within ten (10) days after the entry of the court's determination of the original motion." The purpose of this ten-day window period is to ensure some measure of finality, an interest that underlies Local Rule 6.3.[24]

May 10, 2005) (stating that "a motion for reconsideration cannot assert new arguments or claims which were not before the court on the original motion"); *Pannonia Farms, Inc. v. USA Cable,* 2004 U.S. Dist. LEXIS 15737, No. 03 Civ. 7841, 2004 WL 1794504, at *3 (S.D.N.Y. Aug. 10, 2004) (reconsideration "is not occasion for a party to craft new and previously untested legal theories").

[21] *See Colodney v. Continuum Health Partners, Inc.*, 2004 U.S. Dist. LEXIS 16425, No. 03 Civ. 7276, 2004 WL 1857568, at *1 (S.D.N.Y. Aug. 18, 2004).

[22] *Delvi,* 2004 U.S. Dist. LEXIS 1672, 2004 WL 235211, at *1, n.2.

[23] *Id.*

[24] *See Carolco Pictures,* 700 F. Supp. at 170.

Although Yannotti's Rule 29 motion was decided on December 30, 2005, his motion for reconsideration is dated March 20, 2006, almost three months later. Yannotti did not cite any newly-decided cases in support of his motion nor did he offer a credible reason for his late filing. In fact, Yannotti provided no excuse for the delay but simply stated, conclusively, that "[t]his motion for reconsideration is not untimely, as no time limit for such motions is prescribed by rule."[25] While this may be true technically, if Local Rule 6.3 is indeed applicable to criminal cases, by default or otherwise, the entire Rule is applicable, including its time limit for filing. Yannotti's motion for reconsideration is therefore untimely and can be dismissed on this basis alone. I will, however, address the merits of Yannotti's motion, if only to clarify my earlier Opinion.

B. Cases in Support of Reconsideration

1. *Labat*

Yannotti takes issue with this Court's citation to *Pinkerton v. United States*[26] for the proposition that "[a] defendant is liable for the acts of his co-conspirators if the acts were taken in furtherance of the conspiracy and were a reasonably foreseeable

---

[25] 3/20/06 Letter from Diarmuid White to the Court, at 2 n.1.

[26] 328 U.S. 640, 646-48, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946).

consequence of the conspiratorial agreement."[27] Yannotti correctly points out that the *Pinkerton* theory of liability is not available where the jury has not been instructed on that theory.[28] However, Yannotti ignores the preceding language in *Labat* which states:

> Under [the *Pinkerton*] theory, a coconspirator who does not directly commit *a substantive offense* may nonetheless be held liable for *that offense* if it was committed by another coconspirator in furtherance of the conspiracy and was a reasonably foreseeable consequence of the conspiratorial agreement.[29]

The issue in *Labat* was the application of principles of conspiracy law to uphold a guilty verdict against a defendant for a *substantive offense* (cocaine possession) when the jury was never instructed as to such an expanded theory of liability. With respect to the RICO Conspiracy charged in Count Two, no *Pinkerton* jury charge was required to hold Yannotti responsible for the acts of his coconspirators in furtherance of that conspiracy. That is a basic principle of conspiracy

---

[27] *Yannotti*, 415 F. Supp. 2d at 292, n.70.

[28] *See Labat*, 905 F.2d at 23 ("[T]he *Pinkerton* theory is not available on this appeal, for the jury was not instructed that it could find Labat guilty of possession on this basis.").

[29] *Id.* (brackets and emphasis added).

law.[30] As the record reflects, the jury was charged extensively about the law of conspiracy permitting it to consider, as part of the charged conspiracy, acts committed by co-conspirators, regardless of whether Yannotti committed or agreed to commit such acts.[31] The Opinion's reference to *Pinkerton*, which was admittedly erroneous, had no affect on the analysis or outcome of that Opinion. Accordingly, *Labat* is not a controlling decision for purposes of reconsideration.

2. *Bruno*

Yannotti also takes issue with this Court's application of *United States v. Persico*[32] to the statute of limitations analysis. In *Persico*, the Second Circuit stated:

> Because the RICO conspiracy statute does not require proof of an overt act, we believe that the crime of RICO conspiracy is not complete until the purposes of the conspiracy

---

[30] *See Salinas v. United States*, 522 U.S. 52, 64, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997) (stating the common-law principle "that, so long as they share a common purpose, conspirators are liable for the acts of their co-conspirators"). *See also United States v. Saavedra*, 223 F.3d 85, 96 (2d Cir. 2000) (Cabranes, J., dissenting) (stating the uncontroversial principle that "'a defendant is liable for the acts of a co-conspirator in furtherance of the conspiracy'") (quoting *United States v. Naranjo*, 14 F.3d 145, 147 (2d Cir. 1994)).

[31] *See, e.g.*, Trial Transcript ("Tr.") at 5059, 5074-78, 5082-83, 5106.

[32] 832 F.2d 705 (2d Cir. 1987).

> either have been accomplished or abandoned.[33]

The court further explained that "the agreement proscribed by section 1962(d) is conspiracy to participate in a charged enterprise's affairs, not conspiracy to commit predicate acts."[34] Because the charged enterprise's affairs included construction industry extortion, conspiracy to commit securities fraud, and securities fraud,[35] the statute of limitations was deemed satisfied as to Yannotti even though the Government offered no proof that Yannotti himself agreed to commit those racketeering acts.

Yannotti argues that this reasoning is suspect given the following statement by the Second Circuit in *Bruno:* "Here, because we reverse the RICO conspiracy convictions on other grounds, we do [not] reach the issue, as we did not in *Spero,* of what

---

[33] *Id.* at 713.

[34] *Id.*

[35] For example, Louis Mariani, a co-defendant, was convicted of conspiracy to commit securities fraud during the period 1995 through 2002. *See* Presentence Report of Louis Mariani ¶ 23. Mariani was also convicted of two counts of substantive securities fraud during the same time period. *See id.* ¶¶ 24-25. As for construction industry extortion, Michael DiLeonardo, a cooperating witness, pled guilty in May 2003 to, *inter alia,* extortion of various construction companies from 1980 through November 2002, the time he began cooperating with the Government. *See* 8/24/05 Tr. at 2985-86. DiLeonardo testified that from 1992 through June 2002, he remitted millions of dollars in proceeds from construction industry extortion to Gotti. *See id.* at 2919, 2944.

implications a defendant's continued membership in an ongoing organized crime family may have on the statute of limitations for a conspiracy charge."[36] According to Yannotti, "[h]ad *Persico* meant that mere continued membership in an ongoing organized crime family satisfies the statute of limitations for a RICO conspiracy charge, *Bruno* would have stated as much, rather than passing on the question."[37]

What Yannotti fails to recognize is the context in which the *Bruno* statement was made. In *Bruno,* the defendants were charged with "violating the RICO statute by conspiring to commit the predicate racketeering acts enumerated in Count II," otherwise referred to as "racketeering conspiracy."[38] Count II charged several defendants with "conducting the affairs of the Genovese Family enterprise through a pattern of racketeering activities, consisting of five predicate acts."[39] However, four out of the five enumerated racketeering activities were committed outside the limitations period.[40] Only the obstruction-of-justice conspiracy ("Racketeering Act Four") occurred within the limitations period.[41] But the conviction for that conspiracy was reversed because the

---

[36] *Bruno,* 383 F.3d at 81, n.10.

[37] 3/20/06 Letter at 10.

[38] *Bruno,* 383 F.3d at 76.

[39] *Id.*

[40] *See id.* at 81, n.10.

[41] *See id.*

evidence was legally insufficient to prove either the second or third elements of a conspiracy to obstruct justice.[42] Thus, the Second Circuit was faced with a conviction for RICO conspiracy where none of the alleged predicate acts were proved to be committed *by anyone* within the limitations period. It was within this context that the Second Circuit declined to rule on whether mere membership in an organized crime family can support a RICO conspiracy conviction.

The limited relevance of the *Bruno* statement to the unique fact pattern presented in that case is further supported by the court's reference to *United States v. Spero.*[43] In *Spero,* "the Government alleged that Spero, while conducting the affairs of the Bonanno Organized Crime Family, conspired in violation of 18 U.S.C. § 1962(d) to engage in five specifically enumerated racketeering acts prohibited by 18 U.S.C. § 1962(c)."[44] However, it was uncontested that Racketeering Acts # 2-5 were all completed before the five-year limitations period ended on May 25, 1994, while Racketeering Act # 1, a loansharking conspiracy, extended into May 1999.[45] The defendant argued that the Government failed to prove that any of his loansharking activities took place after May 25,

---

[42] *See id.* at 87-88.

[43] 331 F.3d 57 (2d Cir. 2003).

[44] *Id.* at 59.

[45] *See id.* ("This allegation, if proven, would bring the charged conduct within the limitations period.").

1994, thereby rendering the RICO conspiracy count time-barred.[46]

The district court rejected defendant's argument on the basis of *United States v. Salerno,*[47] which in turn relied on *Persico*. "The [district] [c]ourt understood these cases to stand for the proposition that once the Government established that Spero continued to act as a member of the Bonanno Organized Crime Family after May 25, 1994, the RICO conspiracy with which he was charged was deemed to have operated after that date as well-regardless of when Racketeering Act # 1 took place."[48] The Second Circuit found it unnecessary to pass on the district court's interpretation of *Persico* and *Salerno*, holding that the defendant failed to rebut the presumption that the loansharking conspiracy continued past May 25, 1994.[49]

The statements made in *Bruno* and *Spero* do not undermine this Court's interpretation of *Persico*. Rather, these statements merely evince the Second

---

[46] *See id.*

[47] 868 F.2d 524, 534 (2d Cir. 1989) (holding that a RICO conspiracy is complete only when the purposes of the conspiracy have either been accomplished or abandoned).

[48] *Spero*, 331 F.3d at 59-60. Here, Yannotti never claimed to have withdrawn from the Gambino Crime Family. Rather, Yannotti argued that the loansharking conspiracies with which he was charged ended outside the statute of limitations. *See, e.g.*, Tr. at 4816-18, 5017-18.

[49] *See id.* at 60.

Circuit's reluctance to hold that a RICO conspiracy conviction may be supported by a defendant's mere membership in an organized crime family, without the presence of any timely racketeering acts by any co-conspirator. *Bruno,* therefore, is not a controlling decision overlooked by this Court. In sum, the key is whether any predicate acts were committed by any co-conspirator within the RICO limitations period, not the correlation of particular predicate acts to particular defendants.[50] Here, predicate acts within the limitations period were committed by Yannotti's co-conspirators.[51] Having failed to withdraw from the charged conspiracy, Yannotti is responsible for these acts even though he did not agree to commit those particular acts.[52] Yannotti's motion for reconsideration is therefore denied.

C. Bail

The Bail Reform Act sets forth the procedures by which judicial officers determine whether a convicted

---

[50] *See United States v. Ciccone,* 312 F.3d 535, 542 (2d Cir. 2002) ("Gotti need not be named in a predicate act charged in the indictment to be guilty of a racketeering conspiracy that includes that predicate act.").

[51] *See supra* note 34.

[52] "[A] conspirator charged with racketeering conspiracy need not commit or even agree to commit the predicate acts that are elements of a substantive count to be found guilty of the racketeering conspiracy, for 'it suffices that he adopt[ed] the goal of furthering or facilitating the criminal endeavor.'" *Ciccone,* 312 F.3d at 542 (quoting *Salinas,* 522 U.S. at 65).

defendant is eligible for release pending appeal.[53] The Second Circuit explained that:

> [w]hile the language of section 3143(b)(2) compels detention, an exception permits release of mandatory detainees who meet the requirements for release under section 3143(b)(1), and "if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate." 18 U.S.C. § 3145(c). Thus, section 3143(b)(1) supplies the threshold requirements that a person convicted of a violent crime must meet. To satisfy those requirements, the trial judge must find that the person poses no risk of flight and no danger to the community during release and that the appeal "raises a substantial question of law or fact likely to result in" reversal, a new trial, or a reduced sentence, and is not interposed for purposes of delay. 18 U.S.C. § 3143(b)(1). Only then does the trial court consider the presence of exceptional circumstances making detention inappropriate. *See United States v. Carr,* 947 F.2d 1239, 1240 (5th Cir. 1991) (per curiam) (exceptional reasons provision to be applied on original application despite inclusion of provision "in a section generally covering appeals").[54]

---

[53] *See* 18 U.S.C. §§ 3143(b), 3145(c).

[54] *United States v. DiSomma,* 951 F.2d 494, 496 (2d Cir. 1991).

On March 3, 2005, this Court affirmed the magistrate judge's decision denying Yannotti's initial bail application.[55] At that time, Yannotti faced a potential sentence of life in prison without parole, which I found provided a strong incentive to flee.[56] But Yannotti no longer faces a life sentence, having been acquitted of all but one charge. Thus, his risk of flight is substantially reduced. I also noted that Yannotti was charged with crimes of violence, including two attempted murders and a double homicide, and that he therefore posed a danger to the community.[57] Because Yannotti has been acquitted of those charges, the evidence of danger to the community is not as strong as it was. Accordingly, there may be some combination of conditions that could reasonably assure the safety of the community. However, Yannotti must also satisfy the third requirement – "that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in – (i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the

---

[55] *See United States v. Yannotti*, 2005 U.S. Dist. LEXIS 3159, No. 04 CR 690, 2004 WL 488644, at *1 (S.D.N.Y. Mar. 3, 2005) ("I now conclude that the government has demonstrated that no conditions of release will reasonably assure Yannotti's appearance and the safety of the community.") (footnotes omitted).

[56] *See id.*

[57] *See id.*

expected duration of the appeal process."[58] Although Yannotti may have a substantial appellate issue regarding the statute of limitations issue, I need not decide the likelihood of reversal or a new trial because there are no remarkable or uncommon factors associated with Yannotti's detention that would constitute exceptional circumstances favoring release pursuant to 18 U.S.C. § 3145(c).[59]

"Exceptional circumstances exist where there is 'a unique combination of circumstances giving rise to situations that are out of the ordinary.'"[60] "The test under § 3145(c) is necessarily a flexible one, and district courts have wide latitude to determine whether a particular set of circumstances qualifies as 'exceptional.'"[61] For example, an "unusual factual or legal question" may constitute exceptional circumstances as may a "merely substantial question" combined with "one or more remarkable and uncommon factors."[62] However, circumstances that are

---

[58] 18 U.S.C. § 3143(b)(1)(B).

[59] *See generally DiSomma*, 951 F.2d at 498 (finding exceptional reasons for release where the "element of the crime called into question on appeal [violence in a conspiracy to commit robbery conviction] is the element of the bail statute that bars release" and there is a direct and substantial challenge to that element on appeal).

[60] *United States v. Lea*, 360 F.3d 401, 403 (2d Cir. 2004) (quoting *DiSomma*, 951 F.2d at 497).

[61] *Id.*

[62] *DiSomma*, 951 F.2d at 497 ("We do think that an unusual legal or factual question can be sufficient, as it is here, to meet

(Continued on following page)

"purely personal" do not rise to the level of exceptional circumstances that would warrant release.[63]

Yannotti argues that exceptional circumstances support his release as "the RICO conspiracy/statute of limitations issue raised by Yannotti satisfies the standards set forth in *DiSomma,* because the Second Circuit has expressly reserved on that question, leaving it an open one."[64] I disagree. *DiSomma* teaches that a substantial question may suffice only if it accompanied by one or more remarkable and uncommon factors.[65] While Yannotti's argument may be relevant with respect to the third requirement of section 3143, it does not present the type of exceptional circumstance contemplated in section 3145.

---

the test. On the other hand, a merely substantial question may be sufficient, *in the presence of one or more remarkable and uncommon factors,* to support a finding of exceptional reasons for the inappropriateness of detention.") (emphasis added).

[63] *United States v. Lippold,* 175 F. Supp. 2d 537, 540 (S.D.N.Y. 2001). *See also United States v. Bryant,* 873 F. Supp. 660, 663 (N.D. Ga. 1994) (desire to spend time with 2-year-old son before incarceration insufficient); *United States v. Mahabir,* 858 F. Supp. 504, 508 (D. Md. 1994); *United States v. Douglas,* 824 F. Supp. 98, 99-100 (N.D. Tex. 1993) (possible retaliation in jail by co-defendants insufficient); *United States v. Bloomer,* 791 F. Supp. 100, 102 (D. Vt. 1992) (family obligation and medical condition insufficient); *United States v. Taliaferro,* 779 F. Supp. 836, 838 (E.D. Va. 1992) (difficult pregnancy of teenage daughter insufficient).

[64] 5/8/06 Letter at 11.

[65] *See DiSomma,* 951 F.2d at 497.

Accordingly, Yannotti's motion for bail pending appeal is denied.

IV. CONCLUSION

For the foregoing reasons, Yannotti's motion for reconsideration is denied as his request for bail pending appeal. The Clerk of the Court is directed to close this motion (Document # 186).

SO ORDERED:

Shira A. Scheindlin

U.S.D.J.

Dated: New York, New York

July 24, 2006

UNITED STATES OF AMERICA, – against – MICHAEL YANNOTTI, Defendant.

04 CR 690 (SAS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

415 F. Supp. 2d 280*; *2005 U.S. Dist. LEXIS 37825

December 30, 2005, Decided
December 30, 2005, Filed

COUNSEL: For Defendant: Diarmuid White, Esq., White & White, New York, New York

For the Government: Michael G. McGovern, Joon H. Kim, Victor L. Hou, Assistant United States Attorneys, New York, New York.

JUDGES: Shira A. Scheindlin, U.S.D.J.

OPINION BY: Shira A. Scheindlin

OPINION

OPINION AND ORDER

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

On July 21, 2004, Michael Yannotti was charged with committing the following four crimes: (1) the substantive offense of engaging in the affairs of the Gambino Organized Crime Family in violation of the Racketeering Influenced and Corrupt Organizations Act ("RICO"); (2) conspiring to participate in the affairs of the same enterprise; (3) murder of Robert Arena in aid of racketeering; and (4) murder of Thomas Maranga in aid of racketeering.[1]

The substantive RICO charge against Yannotti included four predicate acts. Racketeering Act One charged Yannotti with conspiring to kidnap, the kidnapping, and the attempted murder of Curtis Sliwa.[2] Racketeering Act Two charged Yannotti with conspiring to murder Arena, the murder of Arena, and the murder of Maranga.[3] Racketeering Act Three charged Yannotti with the attempted murder of Robert Tarantola.[4] Finally, Racketeering Act Seven charged Yannotti with conspiring to make extortionate extensions of credit and conspiring to collect

---

[1] *See* Indictment 04 CR 690 (S.D.N.Y. July 21, 2004) ("Indictment") (charging a violation of 18 U.S.C. § 1962(c), 1962(d) and two violations of 18 U.S.C. § 1959(a)).

[2] *See* Indictment P14(a), (b) & (c).

[3] *See id.* P15(a), (b) & (c).

[4] *See id.* P16.

extensions of credit through extortionate means.[5] A trial on these charges was held in August and September of 2005.

On September 20, 2005, after seven days of deliberations, the jury returned a note stating that it had reached a verdict and enclosing the completed Verdict Sheet. After reviewing the Verdict Sheet, I informed the parties that the jury had not checked guilty or not guilty on Count One as to any defendant because it had not unanimously found that the Government proved two predicate acts against any defendant.[6] I then sought the views of the parties as to whether this constituted an acquittal or a hung jury. After much colloquy, Yannotti agreed to accept a mistrial on the deadlocked count, reserving his right to move for a judgment of acquittal in a post-trial motion.[7]

Although the jury was specifically instructed not to do so, it provided the vote split on each of the predicate acts. The following chart depicts the jury's verdict.

---

[5] *See id.* P20(a) & (b). The intervening Racketeering Acts (Four through Six) relate to codefendants and are not relevant here.

[6] *See* Trial Transcript ("Tr.") at 5289.

[7] *See id.* at 5315.

COUNT ONE: RICO Substantive

	Proved	Not Proved
Racketeering Act # 1		
Conspiracy to Kidnap Curtis Sliwa	7	5
Kidnaping of Curtis Sliwa	7	5
Attempted Murder of Curtis Sliwa		X
Racketeering Act # 2		
Conspiracy to Murder Robert Arena		X
Murder of Robert Arena		X
Murder of Thomas Maranga		X
Racketeering Act # 3		
Attempted Murder of Robert Tarantola		X
Racketeering Act # 7		
Conspiracy to Make Extortionate Extensions of Credit	X	

Conspiracy to Collect Extensions of Credit through Extortionate Means	X	

COUNT TWO: RICO Conspiracy

Guilty X Not Guilty ___

COUNT SEVEN: Murder of Robert Arena in Aid of Racketeering

Guilty ___ Not Guilty X

COUNT EIGHT: Murder of Thomas Maranga in Aid of Racketeering

Guilty ___ Not Guilty X

The RICO statute prescribes a five-year statute of limitations.[8] Because this Indictment was filed on July 21, 2004, at least one of the predicate racketeering acts charged against Yannotti in the substantive RICO count must have occurred or continued past July 21, 1999. It is undisputed that three of the four predicate acts alleged against Yannotti occurred outside the limitations period.[9] However, the parties are in disagreement as to whether the fourth charged racketeering act – the two loansharking conspiracies – falls inside or outside of the limitations period.

---

[8] *See* 18 U.S.C. § 3282; *United States v. Spero*, 331 F.3d 57, 59 (2d Cir. 2003).

[9] The charged racketeering acts involving Sliwa occurred in 1992. The charged Arena murder conspiracy and murders of Arena and Maranga occurred in 1996. The charged attempted murder of Tarantola occurred in 1987.

Under Second Circuit law, the statute of limitations analysis for a RICO conspiracy is different than that for a substantive RICO violation. For a RICO conspiracy offense, the statute of limitations starts running "when the purposes of the conspiracy have either been accomplished or abandoned."[10] In *United States v. Persico,* the Second Circuit explained that "the agreement proscribed by section 1962(d) is conspiracy to participate in a charged enterprise's affairs, not conspiracy to commit predicate acts."[11] By contrast, a substantive RICO charge "is barred by limitations as to any defendant unless *that defendant* committed a predicate act within the five-year limitations period."[12]

Yannotti argues that the Government failed to prove that he had any involvement with the charged loansharking conspiracies after July 1999 and therefore, none of the charged predicate acts fall within the limitations period. Accordingly, he moves for a judgment of acquittal on both RICO counts pursuant to

---

[10] *United States v. Salerno,* 868 F.2d 524, 534 (2d Cir. 1989) (citing *United States v. Persico*, 832 F.2d 705, 713 (2d Cir. 1987)).

[11] *Persico,* 832 F.2d at 713.

[12] *Salerno,* 868 F.2d at 534 (emphasis in original) (citing *Persico,* 832 F.2d at 705). Yannotti also joined in the motion brought by co-defendant John A. Gotti seeking a judgment of acquittal based on the jury's inability to reach a unanimous verdict with regard to predicate acts, which has been denied. *See United States v. Gotti,* 413 F. Supp. 2d 287, 2005 U.S. Dist. LEXIS 32018, No. 04 CR 690, 2005 WL 3358643, at *1 (S.D.N.Y. Dec. 8, 2005).

Federal Rule of Criminal Procedure 29 ("Rule 29").[13] For the following reasons. Yannotti's motion is granted in part and denied in part.

II. LEGAL STANDARD

To prevail on a motion for a judgment of acquittal under Rule 29, a defendant must show that "the evidence is insufficient to sustain a conviction."[14] "[A] defendant making an insufficiency claim bears a very heavy burden."[15] "The ultimate question is not whether [the court] believe[s] the evidence adduced at trial established defendant's guilt beyond a reasonable doubt, but whether any rational trier of fact could so find."[16] "In other words, the court may enter a judgment of acquittal only if the evidence that the defendant committed the crime is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt."[17]

---

[13] Yannotti withdrew his motion pursuant to Federal Rule of Criminal Procedure 33 for a new trial on the RICO conspiracy count. *See* 12/1/05 Letter from Diarmiud White, Yannotti's attorney.

[14] Fed. R. Crim. P. 29(a).

[15] *United States v. Desena*, 287 F.3d 170, 177 (2d Cir. 2002). *Accord United States v. Best*, 219 F.3d 192, 200 (2d Cir. 2000).

[16] *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)) (emphasis omitted).

[17] *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999) (quotation marks and citation omitted). *Accord United States v. MacPherson*, 424 F.3d 183, 187 (2d Cir. 2005).

A court must grant a motion under Rule 29 "if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt."[18] "But at the end of the day, 'if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt.'"[19]

In considering the sufficiency of the evidence, the court must "view all of the evidence in the light most favorable to the government."[20] A court must analyze the pieces of evidence not separately, in isolation, but together, in conjunction with one another.[21] Accordingly, a court must apply the sufficiency test "to the totality of the government's case and not to each element, as each fact may gain color from the others."[22]

To avoid usurping the role of the jury, courts must "'resolve all issues of credibility in favor of the

---

[18] *United States v. Mariani*, 725 F.2d 862, 865 (2d Cir. 1984).

[19] *United States v. Cassese*, 428 F.3d 92, 99 (2d Cir. 2005) (quoting *United States v. Glenn*, 312 F.3d 58, 70 (2d Cir. 2002)) (ruling on a Rule 29 motion).

[20] *United States v. Aleskerova*, 300 F.3d 286, 292 (2d Cir. 2002); *United States v. Reyes*, 302 F.3d 48, 52 (2d Cir. 2002).

[21] *See United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000).

[22] *Guadagna*, 183 F.3d at 130. *Accord Reyes*, 302 F.3d at 53 ("We consider the evidence as a whole.").

jury's verdict.'"[23] "The credibility of witnesses is the province of the jury, and [a court] simply cannot replace the jury's credibility determinations with [its] own."[24] "The task of choosing among competing, permissible inferences is for the [jury], not for the reviewing court."[25] Furthermore, "the jury's verdict may be based on entirely circumstantial evidence."[26] Because the jury is entitled to choose which inferences to draw, the Government, in presenting a case based on circumstantial evidence, "need not 'exclude every reasonable hypothesis other than that of guilt.'"[27] But "a conviction based on speculation and

---

[23] *Desena*, 287 F.3d at 177 (quoting *United States v. Desena*, 260 F.3d 150, 154 (2d Cir. 2001)).

[24] *United States v. James*, 239 F.3d 120, 124 (2d Cir. 2000). *Accord Autuori*, 212 F.3d at 114 (a court "may not substitute [its] own determinations of credibility or relative weight of the evidence for that of the jury"). Moreover, a court must "credit[ ] every inference that the jury might have drawn in favor of the Government." *United States v. Morrison*, 153 F.3d 34, 49 (2d Cir. 1998).

[25] *United States v. McDermott*, 245 F.3d 133, 137 (2d Cir. 2001).

[26] *United States v. Martinez*, 54 F.3d 1040, 1043 (2d Cir. 1995).

[27] *Guadagna*, 183 F.3d at 130 (quoting *Holland v. United States*, 348 U.S. 121, 139, 75 S. Ct. 127, 99 L. Ed. 150, 195-2 C.B. 215 (1954)); *Reyes*, 302 F.3d at 56 (by "discounting evidence of guilty knowledge entirely because there were possible . . . innocent explanations for [defendant's] conduct," the district court "failed to view the evidence in the light most favorable to the Government"); *Autuori*, 212 F.3d at 114 ("The Government need not negate every theory of innocence.").

surmise alone cannot stand."[28] Moreover, a "jury is entitled to a vast range of reasonable inferences, but may not base a verdict on mere speculation."[29]

III. DISCUSSION

A. Substantive RICO

1. Evidence at Trial

a. Evidence of Yanotti's Loansharking Activities Before July 21, 1999

The Government's bill of particulars identifies Yannotti's coconspirators in the loansharking conspiracies as Nicholas Corozzo, Lenny DiMaria, Andrew DiDonato, and Salvatore Braccia.[30] The Government offered no evidence at trial concerning Yannotti's involvement with Braccia. Furthermore, DiDonato was arrested and began cooperating with the Government on May 8, 1997.[31] Accordingly, only the evidence of Yannotti's participation in loansharking conspiracies

---

[28] *United States v. D'Amato,* 39 F.3d 1249, 1256 (2d Cir. 1994).

[29] *United States v. Wilson,* 333 U.S. App. D.C. 103, 160 F.3d 732, 737 (D.C. Cir. 1998) (quotation marks and citation omitted)).

[30] *See* 5/23/05 Letter from AUSA Michael McGovern to Jeffrey Lichtman, counsel to John A. Gotti, at 10.

[31] Because of that cooperation, DiDonato effectively withdrew from any loansharking conspiracy. Thus, none of his loansharking activities could have occurred within the limitations period.

with Corozzo and DiMaria is relevant to Yannotti's statute of limitations defense.[32] To establish Yannotti's participation in the loansharking conspiracies with Corozzo and DiMaria, the Government relies on the testimony of three cooperating witnesses: Michael DiLeonardo, Anthony Rotondo, and Andrew DiDonato.

DiLeonardo testified that in December 1994, Nicholas Corozzo told him "how capable [Yannotti] was, he's a worker, chop shops, things like that, stolen car rings and [he's] a very capable guy that we trusted."[33] In response to the leading question: "At anytime did he discuss whether Yannotti was loansharking for him?" DiLeonardo answered: "Yes, he had different functions. Like I said, he was giving me his pedigree, and one thing would be loansharking, bookmaking. He had his own little crew around him."[34] DiLeonardo testified that throughout the 1990s, Corozzo was pushing for Yannotti to become a made member of the Gambino Family and had listed, as part of his criminal pedigree, his loansharking and bookmaking activities.[35]

---

[32] Corozzo was allegedly a captain in the Gambino Crime Family and DiMaria was allegedly a soldier and, at times, an acting captain.

[33] Tr. at 2975-76.

[34] *Id.* at 2976.

[35] *See id.* at 2976.

Rotondo testified that in late 1994 or 1995, he was told by DiMaria, an acting captain for Nicholas Corozzo, that "he just had a couple of kids he was interested in and Mickey Yannotti was one of them and Nickey's son-in-law the other and they were going to be straighten him [sic] out."[36] DiMaria further told Rotondo that DiMaria and a number of Gambino soldiers "trusted [Yannotti] enough to take care of the loansharking book for [DiMaria], push money, collect money."[37]

DiDonato testified, without temporal reference, that as a member of Nicholas Corozzo's crew, Yannotti used a number of Gambino associates to help lend and then collect loansharking money.[38] DiDonato testified that he knew Yannotti made money from loansharking because DiDonato "was privy to some of his customers."[39] DiDonato testified that in 1996, Yannotti told DiDonato that he had to collect some loansharking money from a Gambino associate named Joe "Babes" Serrano.[40] Sometime between 1994 and 1995, Yannotti told DiDonato to catch up with a neighborhood kid named "Vinny" because Vinny owed Yannotti money.[41] DiDonato also interpreted two

---

[36] *Id.* at 1364.

[37] *Id.* at 1364.

[38] *See* Tr. at 1008, 1057.

[39] *Id.* at 1008.

[40] *See id.* at 1063.

[41] *See id.* at 1009.

recorded telephone conversations in April 1996 between Yannotti and "James" and "Andy" as loansharking conversations.[42] Furthermore, DiDonato testified that despite Corozzo's arrest in 1996, Corozzo continued to collect the proceeds of a robbery through intermediaries.[43]

The Government contends that the testimony of these cooperating witnesses alone is sufficient to support Yannotti's involvement in loansharking activities after July 1999. Those witnesses testified that certain other Gambino Family members and associates continued to collect and lend out money on the street while incarcerated.[44] This was made possible because persons on the outside passed messages to and from those incarcerated.[45] But the Government

---

[42] *See id.* at 1062-69. No evidence was offered at trial as to the identity or last names of these individuals.

[43] *See id.* at 941-42. The Government incorrectly states that DiDonato testified that Corozzo continued to collect money on his "rackets" through intermediaries. Government's Memorandum of Law in Opposition to Defendant Yannotti's Post-Trial Motions ("Gov't Mem.") at 16. The transcript, however, reveals the following colloquy:

> Q. Even though Nicholas Corozzo, your captain, was still off the street at the end of 1996, were you still able to send money to him?
>
> A. Well, he wanted money from me from proceeds from *the robbery* . . .

Tr. at 941 (emphasis added).

[44] *See, e.g., id.* at 669-71, 890.

[45] The Government cites numerous examples of such messages in its opposition papers. *See* Gov't Mem. at 17-18. The

(Continued on following page)

presented no evidence of any particular message sent or received by Nicholas Corrozzo or DiMaria while incarcerated.

Additionally, witnesses testified that certain Gambino Family members were able to manage the loansharking book of an incarcerated conspirator.[46] According to the Government, "it was hardly a leap of faith for the jury to infer from this breadth of evidence that Yannotti managed Corozzo and DiMaria's sizeable loanshark book after their respective arrests and that this loanshark business continued as usual."[47] But the Government did not present any

---

Government has acknowledged that one of the examples it provided was erroneous. *See* 12/2/05 Letter from AUSA Michael McGovern to the Court at 1 n.1. The Government had argued that Frank Fappiano passed messages to Nicholas Corozzo through Joseph Corozzo, an attorney. *See* Gov't Mem. at 17 (citing Tr. at 307). However, the message did not involve Nicholas Corozzo, but rather Jackie D'Amico, who was incarcerated at the same facility as Fappiano and Corozzo. And the message was not sent through Joseph Corozzo, an attorney, but through "Jo Jo" Corozzo, Nicholas Corozzo's brother.

[46] The Government points to Gambino Underboss Salvatore Gravano who had a loansharking book worth millions of dollars when he decided to cooperate with the Government in late 1991. *See id.* at 1935-37, 2895-96. Despite Gravano's arrest and cooperation with the Government, DiLeonardo, at the direction of John A. Gotti, Sr., was able to collect several hundred thousand dollars. *See id.* at 2897-98.

[47] Gov't Mem. at 20. Although the record indicates that Corozzo was incarcerated in December 1996, *see* Tr. at 2187, and that DiMaria was incarcerated at around the same time, the record does not contain the release dates for either. Although the exact release dates are not found in the record, Corozzo was

(Continued on following page)

evidence that Yanotti continued the charged loansharking conspiracy after July 21, 1999.

b. Purported Proof of Yanotti's Loansharking Activities After July 21, 1999

In addition to cooperator testimony, the Government cites other purported proof of Yannotti's involvement with loansharking. For example, New York City Police Detective Steven Bobbett testified that on December 16, 1999, during a lawful search of Yannotti, he recovered approximately $2,700 in one hundred dollar bills.[48] The Government also refers to alleged loansharking records which were recovered from Ralph Davino, a member of Nicholas Corozzo's crew, at the time of his arrest in December 1996. Included in those records were the names "Vinny," "JJ," "Tom," "Tony," and "Dom."[49] At the time of Yannotti's arrest in July 2004, his address book listed the names and telephone numbers for Vinny, JJ, Tom,

---

incarcerated from December 1996 through June 2004 and DiMaria was incarcerated from December 1996 through March 2005. *See* Federal Bureau of Prisons – Inmate Locator, *at* www.bop.gov/iloc2/LocateInmate.jsp.

[48] *See* Tr. at 3921. The Government also notes that when Yannotti was arrested in June 2004, he was carrying $1,000 in cash. This, of course, is irrelevant because the Indictment charges that the loansharking conspiracy ran from 1993 to 2002. *See* Indictment P19(b) & (c).

[49] *See* Government Exhibits ("GX") 907C and 907D.

Tony, and Dom.[50] The Government argues that because names that appeared in Davino's loansharking records were also found in Yannotti's address book this somehow proves that Yannotti continued to operate Nicholas Corozzo's loansharking business eight years after Corozzo's arrest in 1996.

2. Insufficiency of the Trial Evidence

No witness testified about any loansharking activity by or on behalf of Corozzo, DiMaria, or Yannotti after 1996. There were no recorded conversations concerning loansharking after 1996, nor were any loansharking records found on Yannotti at any time after 1996. Furthermore, Yannotti's co-conspirators, Corozzo and DiMaria, who, under the Government's own theory, provided Yannotti with loansharking money, were arrested in December 1996, and were incarcerated for many years thereafter, well beyond July 21, 1999. Although there is evidence that *other* Gambino Family members may have continued criminal conspiracies after the incarceration of co-conspirators, by passing messages for example, this only shows it was *possible* for Yannotti to continue the conspiracy after 1996. A speculative leap is required to conclude that Yannotti in fact continued loansharking.

---

[50] *See* GX 904.

With respect to the $2,700 found on Yannotti in December 1999, the money could have been the proceeds of any criminal conduct. No proof was offered connecting this money to loansharking activity. While a jury may draw reasonable inferences, it may not engage in impermissible speculation.[51]

There are two problems with the alleged loansharking records recovered from Davino. *First,* a review of the entire set of records seized from Davino reveals that the records were gambling records, not loansharking records.[52] Exhibits 907F and 907G are indisputably betting sheets with one referring to "picks" and the other to football games and point spreads. Exhibit 907E appears to be a record of bettors identified by customer number, *e.g.,* # 6, # 11. Significantly, some of the same names appearing on Exhibit 907E, such as JJ, Tom, and Tony, also appear on Exhibit 907D, an alleged loansharking record. Thus, in all likelihood, Exhibit 907D was a gambling record, rather than a loansharking record. *Second,* Tom, Vinny, JJ, Tony, and Dom are common Italian names that constitute five of the forty-two names

---

[51] The jury was instructed accordingly. *See* Tr. at 5036 ("The matter of drawing inferences from facts in evidence is not a matter of guesswork or speculation."). This instruction is in accordance with Sand's Modern Federal Jury Instructions, Criminal, *see* Instruction 6-1 ("An inference is not a suspicion or a guess.") and existing case law. *See D'Amato,* 39 F.3d at 1256; *Wilson,* 160 F.3d at 737.

[52] *See* Exhibits 907E-G marked for identification, but not introduced at trial.

found in Yannotti's address book. Of greater interest is the fact that none of the more distinctive names found in Davino's records – like "Katz," "O'Toole," "Nate" and "Spider" – appear in Yannotti's address book. Simply put, the address book cannot support an inference that Yannotti continued to operate Nicholas Corozzo's loansharking business, even two years after Corozzo's arrest.

In sum, the evidence that Yannotti's loansharking activities extended into the limitations period is so meager that no reasonable jury could have found him guilty of that predicate act beyond a reasonable doubt. As outlined above, no witness testified that Yannotti was involved in loansharking after 1996. Similarly, no physical evidence such as recorded conversations, surveillance, or loansharking records, demonstrate Yannotti's involvement with loansharking after 1996.

3. Presumption of Continuity

The Government therefore relies on the presumption of continuity set forth by the Second Circuit in *United States v. Spero.*[53] In *Spero,* the court held that once the Government has met its "burden of proof by establishing that the loansharking conspiracy existed, it is entitled to a presumption that the conspiracy continued *until defendant demonstrated*

---

[53] 331 F.3d 57.

otherwise."[54] However, that presumption cannot continue indefinitely. The facts of *Spero* must be closely examined. In that case, the defendant was charged with conspiracy in violation of RICO. The statute of limitations cut-off was May 25, 1994, five years prior to the filing of the indictment.[55] The proof at trial revealed that the gambling enterprise with which defendant was involved terminated on or about December 1993, six months outside the limitations period.[56] Defendant argued that his loansharking activities were limited to that gambling enterprise.[57] The court held that the loansharking charges were not so limited and that Spero was presumed to have continued in those activities unless he proved that the goal of the conspiracy was accomplished or that he affirmatively withdrew from or abandoned the charged loansharking conspiracy.[58] Of course, it was only necessary to presume that Spero continued his activities for a period of six months to bring the indictment within the limitations period.

Other cases that have applied the presumption of continuity have done so where a co-conspirator, not the defendant, has committed an act or acts in furtherance of the conspiracy within the limitations

---

[54] *Id.* at 61 (emphasis added).

[55] *See id.* at 59.

[56] *See id.* at 61.

[57] *See id.*

[58] *See id.*

period.[59] In these cases, the only question is whether the defendant should be liable for these co-conspiratorial acts where there is no proof that he engaged in any criminal conduct during the limitations period. In the absence of proof of withdrawal or abandonment, courts have held that the presumption of continuity permits the inference that the defendant is still involved in the conspiracy and therefore liable for the acts of his co-conspirators.[60]

The facts here are quite different from *Spero*, *Brown*, and *Salmonese*. Unlike in *Brown* or *Salmonese*, no evidence was offered at trial that *any* of the coconspirators identified in the Government's Bill of Particulars conducted *any* loansharking activities within the limitations period. This case is also distinguishable from *Spero* for two reasons: (1) given the absence of proof that any of the alleged co-conspirators engaged in loansharking during the limitations period, there is no rational basis to support the inference that two and a half years after his

---

[59] *See, e.g., United States v. Brown*, 332 F.3d 363, 373-74 (6th Cir. 2003) (applying the presumption of continuity where co-conspirators committed overt acts within the limitations period and two years after the last overt act was committed by the defendant); *United States v. Salmonese*, 352 F.3d 608, 616-17 (2d Cir. 2003) (concluding that statute of limitations was satisfied by evidence that defendant's co-conspirator received fraud proceeds within the limitations period despite defendant's argument that the conspiracy ended one month earlier, when their manipulation of the market for certain warrants ended).

[60] *See Brown*, 332 F.3d at 374; *Salmonese*, 352 F.3d at 617.

co-conspirators were incarcerated, Yannotti was still participating in loansharking with them[61] and (2) Yannotti's co-conspirators, who were the source of his loansharking funds, were incapacitated by virtue of their incarceration throughout those two and a half years.

Spero begs the question of how Yannotti can prove a negative – that the loansharking conspiracies alleged in Count One ended before July 21, 1999.[62] Of course, no witness testified that Corozzo's and DiMaria's loansharking activities, and Yannotti's affiliation therewith, ended permanently and forever in 1996. But like Sir Arthur Conan Doyle's dog that didn't bark, the lack of evidence of loansharking by Yannotti after 1996 is highly probative.[63] In the face

---

[61] There is no question here of judging credibility, which a court may not do. Rather, this is a question of whether an inference has a rational basis or is an impermissible exercise of guesswork or speculation. *See* Tr. at 5036 (instructing the jury that "an inference is a logical factual conclusion which you might reasonably draw from other facts that have been proven").

[62] *See Elkins v. United States*, 364 U.S. 206, 218, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960) ("As a practical matter it is never easy to prove a negative.").

[63] "The law draws no distinction between direct and circumstantial evidence in requiring the government to carry its burden of proof. A verdict of guilty may be based entirely on circumstantial evidence as long as the inferences of culpability drawn from the circumstances are reasonable." *MacPherson*, 424 F.3d at 190 (citations omitted). Accordingly, it follows that a defendant's burden to affirmatively prove that a conspiracy terminated or was abandoned may also be satisfied by circumstantial evidence. To hold otherwise would violate due process. A

(Continued on following page)

of this lack of evidence, the presumption that the loansharking conspiracy continued for two and a half years after the incarceration of both remaining co-conspirators is impermissible speculation.

Given the facts presented here – the length of the presumption, the proof that the co-conspirators in all likelihood could not have continued with their illegal activities, and the absence of proof regarding Yannotti's loansharking activities within the limitations period despite the testimony of three cooperators with knowledge of these particular conspiracies (DiLeonardo, Rotondo, and DiDonato) – the presumption alone is insufficient to sustain a conviction.[64] Together, these three circumstances are compelling circumstantial evidence that the loansharking conspiracies alleged in the Indictment terminated well before July 21, 1999, thus rebutting the presumption of continuity. To hold otherwise would eviscerate the requirement that the Government prove its case against a defendant beyond a reasonable doubt and undermine the purpose of the statute of limitations.

---

district court may acquit a defendant after a jury verdict of guilty based on circumstantial evidence where nearly equal circumstantial evidence supports a theory of innocence. *See Cassese*, 428 F.3d at 103.

[64] Albeit in a different context and not of recent vintage, the Second Circuit has suggested that at some point, the lack of evidence of participation in a conspiracy by a low-level drug conspirator for a substantial period of time suffices to extinguish the presumption of continuity. *See United States v. Borelli*, 336 F.2d 376, 384 (2d Cir. 1964).

There is simply no evidence in this record that any of the alleged co-conspirators engaged in loansharking during the limitations period. I therefore conclude that no reasonable jury could have found that Yannotti participated in that conspiracy after July 21, 1999. Count One of the Indictment is therefore dismissed pursuant to Rule 29.

B. RICO Conspiracy

There can be no claim that the goals of the charged RICO conspiracy – to conduct the affairs of the Gambino Organized Crime Family through a pattern of racketeering activity – ended outside the limitations period. However, Yannotti argues that while the charged *enterprise* is the Gambino Organized Crime Family, the charged *conspiracy* is the agreement to participate in the conduct of the affairs of that enterprise through a pattern of racketeering activity, and that the enterprise and the conspiracy cannot be the same.[65] Yannotti further argues that "it is not enough for the Government to establish that the defendant continued to act *as a member of the alleged organized crime family* in order to satisfy the statute of limitations; the Government must establish that the defendant agreed to participate in the enterprise's affairs through the particular pattern of

---

[65] *See* Memorandum of Law in Support of Defendant Michael Yannotti's Post-Trial Motions at 6.

racketeering activity charged in the indictment."[66] Finally, Yannotti concludes that if the evidence shows that he neither committed a charged predicate act within the five-year limitations period nor that he agreed to participate in the enterprise's affairs through the particular pattern of racketeering activity charged in the Indictment during that period, then the statute of limitations is not satisfied as to the RICO conspiracy count as well as the RICO substantive count.[67]

Yannotti's argument, however, ignores the teaching of *United States v. Persico,* which held that the agreement "proscribed by section 1962(d) is conspiracy to participate in a charged enterprise's affairs, not conspiracy to commit predicate acts."[68] There was more than sufficient evidence at trial to support the finding that the activities of the Gambino Organized Crime Family continued into the limitations period and that Yannotti was a member of that conspiracy. Viewed in the light most favorable to the Government, the Government proved beyond any reasonable doubt that the activities of the enterprise, through the pattern of racketeering activity charged in the Indictment, continued well into the limitations period. For example, there was substantial evidence that the conspiracy to commit extortion in the construction

---

[66] *Id.* at 6-7 (emphasis in original).

[67] *See id.* at 7.

[68] *Persico,* 832 F.2d at 713.

industry and the conspiracy to commit securities fraud extended well into the limitations period.[69] Because there is no evidence that Yannotti withdrew from the conspiracy, he remains responsible for those activities.[70] Therefore, Yannotti's argument that he is entitled to a judgment of acquittal on the RICO *conspiracy* charge because the Government failed to

---

[69] *See, e.g.*, Tr. at 2724 (DiLeonardo testifying that he handled illegal business activities on behalf of the Gambino family in the spring of 2000 in the construction industry and stock market); *id.* at 2751-52 (testimony from DiLeonardo stating that he received proceeds of Sal Romano and Joseph Quatrocchi's stock fraud schemes until 2002 and that he distributed those proceeds to Louis Mariani, Joseph D'Angelo, John Junior, and the Family); *id.* at 2956 (DiLeonardo stating that he and Louis Mariani last divided proceeds from Sal Romano's "pump and dump" schemes in 2002); *id.* at 2919 (DiLeonardo testifying that as head of the construction panel for the Gambino family, he distributed construction industry extortion proceeds to John Gotti, Jr. during the period 1992 to June 2002); *id.* at 3869 (Quattrochi stating that he pled guilty to a massive stock fraud scheme involving the Gambino Crime Family that continued into 2002).

[70] Indeed, the Government offered evidence at trial that Yannotti continued to meet with and have telephonic contact with other members and associates of the Gambino family well after July 1999. *See, e.g.*, Tr. at 3911-14, 4138-39, GX 1118. A defendant is liable for the acts of his co-conspirators if the acts were taken in furtherance of the conspiracy and were a reasonably foreseeable consequence of the conspiratorial agreement. *See Pinkerton v. United States*, 328 U.S. 640, 646-48, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946). *See also United States v. Vario*, 943 F.2d 236, 240 (2d Cir. 1991) ("It is a fundamental tenet of the law of conspiracy that reasonably foreseeable acts of individual co-conspirators taken in furtherance of the conspiracy count against all members equally. . . .").

prove that the loansharking conspiracies charged as predicate acts in the RICO *substantive* charge continued into the limitations period, is rejected.

IV. CONCLUSION

For the foregoing reasons, Yannotti's motion under Rule 29 for a judgment of acquittal is granted as to Count One and denied as to Count Two. The Clerk of the Court is directed to close this motion (Document # 151).

SO ORDERED:

Shira A. Scheindlin

U.S.D.J.

Dated: New York, New York

December 30, 2005

UNITED STATES OF AMERICA – against – MICHAEL YANNOTTI, et al., Defendants.

04 Cr. 690 (SAS)

UNITED STATES COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

399 F. Supp. 2d 268*; *2005 U.S. Dist. LEXIS 10015

May 25, 2005, Decided
May 25, 2005, Filed

DISPOSITION:

COUNSEL: For the Government: Michael G. McGovern, Joon H. Kim, Victor Hou, Assistant United States Attorneys, New York, New York.

For the Defendant Michael Yannotti: Diarmuid White, Esq., White & White, New York, New York.

For the Defendant John A. Gotti: Marc Allan Fernich, Esq., Law Office of Marc Fernich, New York, New York; Jeffrey Lichtman, Esq., Law Office of Jeffrey Lichtman, New York, New York.

For the Defendant Joseph D'Angelo: Barry Levin, Esq., Garden City, New York.

For Defendant Louis Mariani: Charles F. Carnesi, Esq., Garden City, New York.

JUDGES: Shira A. Scheindlin, U.S.D.J.

OPINION BY: Shira A. Scheindlin

OPINION

OPINION & ORDER

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

Michael Yannotti ("Yannotti") is charged with murder, two separate attempted murders, and loan-sharking in connection with an alleged racketeering enterprise and racketeering conspiracy in violation of the Racketeer Influenced and Corrupt Organizations Act. Yannotti has moved to suppress all evidence against him that was derived from a wiretap of a cellular telephone that he used while in Florida in 1996. In a Memorandum Opinion and Order dated April 15, 2005, I denied three grounds for suppressing the wiretap evidence: (1) that there was insufficient probable cause to support the wiretap authorization; (2) that the Government's application contained knowing and material falsehoods, warranting a hearing under *Franks v. Delaware*; and (3) that the tapes of the wiretapped conversations had been improperly sealed.[1] However, I allowed additional briefing of a fourth ground for suppression – that the Government was required to seek an amended wiretap order naming Yannotti as an interceptee – which was developed by Yannotti's new counsel at oral

---

[1] *See United States v. Gotti*, 399 F. Supp. 2d 214, 224, 2005 U.S. Dist. LEXIS 6489, No. 04 Cr. 690, 2005 WL 859244, at *8 (S.D.N.Y. Apr. 15, 2005).

argument on April 12, 2005.[2] Yannotti now contends that because the Government failed to seek an amended wiretap order, the interception of his calls (1) constituted an unreasonable search in violation of the Fourth Amendment, (2) exceeded the scope of the wiretap order, or in the alternative (3) rendered the wiretap order "akin to a general warrant."[3] For the reasons that follow, Yannotti's motion to suppress is denied.

II. BACKGROUND[4]

In April 1996, the Government applied to Judge William J. Zloch of the United States District Court for the Southern District of Florida for a wiretap order to intercept wire communications of Nicholas Corozzo,[5] six other named interceptees, and "others yet unknown," over a cellular telephone that had

---

[2] *See id.*

[3] Reply Memorandum of Law on Defendant Michael Yannotti's Motion to Suppress Electronic Surveillance at 7-8.

[4] Familiarity with my April 15 Memorandum Opinion and Order is presumed. I state here only those facts that pertain to the ground for suppression that is the subject of this Opinion.

[5] The application identified Corozzo as a "capo" in the Gambino Organized Crime Family who resided in New York City, but supervised criminal activities in both New York and southern Florida. *See* Affidavit of Special Agent Alan John Hogan, Ex. B to Affidavit of Joseph R. Corozzo, former counsel to Yannotti ("Corozzo Aff."), P13.

been supplied to Corozzo by a confidential source.[6] The application alleged that Corozzo and the others were engaged in a racketeering conspiracy, whose activities included fraud, the sale or receipt of stolen goods, extortion, loansharking, and money laundering.[7] According to the application, a confidential source "furnished the target cellular telephone to COROZZO for his use in conducting the criminal activities referred to herein."[8] The application further stated that "COROZZO is presently using the target cellular telephone."[9]

On the basis of the application, Judge Zloch found that there was probable cause to believe that Corozzo, the six named interceptees, and "others as yet unknown" were engaged in a racketeering conspiracy and, furthermore, that the target cell phone would be used "in connection with [the] commission" of this criminal activity.[10] Accordingly, Judge Zloch

---

[6] *Id.* P3. The other named interceptees were Lenny DiMaria, Ralph Davino, Sidney Alwais, David Alwais, Louis Scida, and Anthony Ruggiano, Jr. *See id.*

[7] *See id.* P4.

[8] *Id.* P77.

[9] *Id.*

[10] Order Authorizing the Interception of Communications, Misc. No. 96-2-WJZ ("Wiretap Order"), Ex. A to Corozzo Aff., at 1, 3. As noted above, I have already found that there was a substantial basis for Judge Zloch's probable cause determination. *See Gotti*, 2005 U.S. Dist. LEXIS 6489, 2005 WL 859244, at *9.

authorized a thirty-day wiretap, commencing on April 12, 1996.[11]

In a ten-day progress report submitted to the court on April 22, 1996, the Government stated that prior to returning to New York on April 13 – the day after the wiretap order was issued – Corozzo gave the target cellular phone to Yannotti, who was identified as an associate in the Gambino Crime Family who reported directly to Corozzo and was the "muscle" in his crew.[12] According to the report, Corozzo indicated at that time that he would return to southern Florida "within a couple of weeks."[13] No calls made by Corozzo were ever intercepted over the target phone prior to his departure. Rather, the logs maintained by the monitoring agents show that all the calls from the beginning of the wiretap on April 12 until 6:21 p.m. on April 13 were from "UF" – *i.e.,* an unidentified female – or "Eileen" (alternatively spelled "Ilean").[14] According to the progress report, at 8:45 p.m. on April 13, Yannotti placed a call on the target phone to Salvatore Pecchio, who informed him that Corozzo had been dropped off at the Fort Lauderdale Airport.[15] The report stated that Corozzo "had just left for New

---

[11] *See* Wiretap Order at 4.

[12] Ten Day Progress Report ("10-Day Report"), Ex. C to Corozzo Aff., PP4-5.

[13] *Id.* P4.

[14] The progress report identified "Eileen" as Eileen Casotto, reportedly a girlfriend of Corozzo. *See id.* P9.

[15] *See id.* P10.

York."[16] Thus, the report shows that when Corozzo departed for New York, the Government knew that he left the target cell phone behind in Florida.

After Corozzo's departure, the Government continued monitoring the target phone. The progress report alleged that Yannotti placed two calls, albeit in guarded language, concerning the collection of loan-sharking payments.[17] According to the Government, these payments were owed to Corozzo.[18] On the basis of these conversations, the report concluded that Yannotti, Corozzo, and others would continue using the target phone to discuss the offenses described in the wiretap order.[19] The report also stated that the Government would identify Yannotti as a named interceptee in the event that the Government sought an extension of the wiretap.[20] No extension was sought.

III. APPLICABLE LAW

The Fourth Amendment requires that a warrant specify "the place to be searched, and the persons or things to be seized."[21] "In the wiretap context, those requirements are satisfied by identification of the

---

[16] *Id.*

[17] *See id.* PP11-12.

[18] *See id.*

[19] *See id.* P13.

[20] *See id.* P6.

[21] U.S. CONST. amend. IV.

telephone line to be tapped and the particular conversations to be seized."[22]

In addition, Title III of the Omnibus Crime Control and Safe Street Act of 1968[23] governs the authorization of wiretaps. Section 2518 requires that an application for a wiretap order include, among other things:

> (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) . . . a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, [and] (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted.[24]

Similarly, the wiretap order itself must specify:

> (a) the identity of the person, if known, whose communications are to be intercepted; (b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted; [and] (c) a particular description of the type of communication sought to be intercepted,

---

[22] *United States v. Donovan,* 429 U.S. 413, 427 n.15, 50 L. Ed. 2d 652, 97 S. Ct. 658 (1977).

[23] 18 U.S.C. §§ 2510-2522.

[24] *Id.* § 2518(1)(b).

> and a statement of the particular offense to which it relates.[25]

A wiretap order need not identify every person whose conversations may be intercepted in order to comply with the Fourth Amendment.[26] Rather, "a court must analyze the facts of each case in order to determine whether the wiretap order and any monitoring searches undertaken pursuant to it conform to fourth amendment requirements."[27]

Section 2515 mandates the suppression of the contents of any intercepted wire communication as well as any evidence derived therefrom "if the disclosure of that information would be in violation of this chapter."[28] Section 2518 lists the circumstances that trigger suppression under section 2515:

> (i) the communication was unlawfully intercepted;

---

[25] *Id.*§ 2518(4). This subsection also requires the order to identify the agency authorized to intercept the communications and to specify the period of time during which the interception is authorized.

[26] *See United States v. Figueroa*, 757 F.2d 466, 472 (2d Cir. 1985).

[27] *Id.* The Second Circuit has held that compliance with Title III amounts to compliance with the Fourth Amendment. *See United States v. Bianco*, 998 F.2d 1112, 1121 (2d Cir. 1993) ("Surveillance that is properly authorized and carried out under Title III complies with the fourth amendment.").

[28] 18 U.S.C. § 2515.

> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.[29]

The Supreme Court has explained that communications are "unlawfully intercepted" in violation of the first prong of the above list only "where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device."[30]

IV. DISCUSSION

Yannotti contends that once the Government knew that Corozzo had left Florida and that the target cell phone was no longer in his possession because it had been given to Yannotti, the Government was required to cease intercepting communications and to seek a new wiretap order authorizing the interception of Yannotti's communications over the phone. As noted above, Yannotti makes three arguments in support of this position. *First,* relying on

---

[29] *Id.* § 2518(10)(a).

[30] *United States v. Giordano,* 416 U.S. 505, 527, 40 L. Ed. 2d 341, 94 S. Ct. 1820 (1974).

Katz v. United States,[31] he maintains that, under the circumstances of this case, the interception of Yannotti's calls was an unreasonable search in violation of the Fourth Amendment. *Second,* he argues that the order cannot be reasonably interpreted as authorizing continuing interceptions in the event that the phone was no longer in Corozzo's possession and, consequently, the Government exceeded the scope of the order. *Third* and finally, Yannotti claims that construing the wiretap order as allowing the continued interception of calls after Corozzo was no longer in possession of the phone would convert the order into a general warrant, also in violation of the Fourth Amendment.

To begin, Yannotti's reliance on *Katz* is misplaced. In that case, the Government intercepted communications from a public telephone *without a court order.* Because the officers failed to obtain a warrant, and none of the exceptions to the warrant requirement applied, the Supreme Court found that the surveillance violated the Fourth Amendment and, therefore, reversed the petitioner's conviction.[32] By contrast, the agents in this case had a warrant to intercept communications over the cell phone used by Yannotti. Consequently, Yannotti's reliance on *Katz* begs the question of whether the wiretap order authorized the agents to intercept his calls. Moreover, as the Supreme

---

[31] 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967).

[32] *See id.* at 357-59.

Court noted in a case in which the Government did not identify several targets of a wiretap,

> the omission on the part of law enforcement authorities was not a failure to seek prior judicial authorization, but a failure to identify every individual who could be expected to be overheard engaging in incriminating conversations. That the complete absence of prior judicial authorization would make an intercept unlawful has no bearing on the lawfulness of an intercept order that fails to identify every target.[33]

In short, the interception of Yannotti's calls did not constitute a warrantless search requiring suppression under *Katz*.[34]

Nor did the continued interception of Yannotti's calls exceed the scope of the wiretap order. As an initial matter, the order authorized the interception of the communications not only of Corozzo, but also of six additional named targets as well as "others yet unknown." On its face, the order does not limit interception to calls placed by Corozzo himself or even while Corozzo was in possession of the target cell phone. On the other hand, the wiretap application plainly anticipated that the phone would be in his

---

[33] *Donovan*, 429 U.S. at 436 n.24.

[34] *Cf. United States v. Duran*, 189 F.3d 1071, 1085 (9th Cir. 1999) (holding that a wiretap order's failure to identify the electronic serial number on the interceptee's new cell phone was not a warrantless search requiring suppression under *Katz*).

possession. Thus, Judge Zloch's probable cause determination was premised on Corozzo's possession of the phone. Cellular telephones, however, are mobile and can be easily handed from one person to another. Consequently, if the Government were not allowed to intercept outgoing calls made on the target cell phone by parties other than Corozzo without first obtaining a new wiretap authorization, it would be effectively impossible to wiretap this or any other cell phone.[35]

Yannotti argues that once it became clear, as stated in the progress report, that Corozzo could not use the phone for "a couple of weeks" for the simple reason that he left the phone in Florida when he departed for New York, continued surveillance became especially problematic. Indeed, it could also be argued that Corozzo's departure dissipated the basis for the probable cause determination, thus requiring the Government to seek a new wiretap order before continuing surveillance of the phone. However, the Government also stated in the same progress report that, despite Corozzo's departure, it had reason to

---

[35] In the context of traditional land lines, courts have upheld wiretaps of telephones that may be used by many individuals, including innocent persons as well as suspects. *See, e.g., Figueroa,* 757 F.2d at 473 (upholding wiretap of a prison telephone that was available to fifty-nine inmates, few of whom were suspects in the investigation). *Cf. United States v. Ambrosio,* 898 F. Supp. 177, 180 (S.D.N.Y. 1995) (upholding wiretap of two telephones located in a pizzeria that were used to conduct the pizzeria's legitimate business as well as to negotiate narcotics transactions).

believe that the target phone would "continue to be used . . . to discuss the offenses described in the Court's order."[36] More specifically, the report indicated that the Government suspected that Yannotti, although not named in the original application, was involved in these offenses.[37] This suspicion was reasonable given Yannotti's alleged role in the Gambino Crime Family and as the "muscle" in Corozzo's crew. Thus, although Corozzo no longer possessed the phone, there was probable cause to believe that it remained an instrumentality of the alleged conspiracy. As a result, the interception of Yannotti's calls did not exceed the scope of the wiretap order.[38]

In regard to Yannotti's third argument, the interception of Yannotti's (and Eileen Cosotto's) calls did not convert the wiretap order into a general warrant. In *United States v. Figueroa*, the Second Circuit held that the interception of calls made at a "quasi-public" telephone in a prison by individuals who were not named in the wiretap order as targets of the Government's investigation did not amount to a

---

[36] *See* 10-Day Report P13.

[37] *See id.* PP4-6, 11-12.

[38] *Cf. United States v. Smith*, 909 F.2d 1164, 1167 (8th Cir. 1990) (holding that police officers were not required to minimize an incoming call to a home telephone after the named target of the wiretap had left the state because they reasonably suspected that the residence would remain "a conduit of information during the trip" and, more particularly, that both participants in the call were co-conspirators with the defendant).

general warrant.[39] In that case, the court noted that the language of Title III "anticipates interception of calls of people whose identities are not known at the time of the application and order."[40] The wiretap order in this case did not give the monitoring agents unfettered discretion to intercept any conversations whatsoever occurring over the target cell phone.[41] By specifying, as section 2518(4) requires, the offenses to which the communications to be intercepted related, the order limited the conversations that the agents could lawfully intercept. In addition, also in accord with Title III, the order required the agents to minimize the interception of innocent conversations.[42]

---

[39] *See Figueroa*, 757 F.2d at 473. *See also United States v. Kahn*, 415 U.S. 143, 154-55, 39 L. Ed. 2d 225, 94 S. Ct. 977 (1974) (rejecting "general warrant" argument where federal agents intercepted the conversations over two home telephones of the named target's wife, who was not identified as an interceptee in the wiretap application because the Government was unaware that she was involved in her husband's illegal gambling activities until the wire interceptions had begun).

[40] *Figueroa*, 757 F.2d at 470.

[41] *See Kahn*, 415 U.S. at 154 ("Neither the statute nor the wiretap order in this case would allow federal agents . . . total unfettered discretion."). *Cf. United States v. Mankani*, 738 F.2d 538, 546 (2d Cir. 1984) (stating that a general warrant is "impermissible because it gives the search party virtually unfettered discretion to seize anything they see").

[42] *See Figueroa*, 757 F.2d at 471 ("Innocent parties are protected from unreasonable surveillance by the requirement contained in § 2518(5) that surveillance 'shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception.' ").

Finally, the order limited the length of surveillance to thirty days and required status reports to be submitted to Judge Zloch every ten days. Therefore, despite the order's failure to name Yannotti as a target, the interception of his calls did not transform that order into a general warrant.

V. CONCLUSION

For the foregoing reasons, Yannotti's motion to suppress the fruits of electronic surveillance of the cellular telephone he used while in Florida in 1996 is denied.

SO ORDERED:

Shira A. Scheindlin

U.S.D.J.

Dated: New York, New York

May 25, 2005

Conference

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- x

UNITED STATES
OF AMERICA,

v.

JOHN A. GOTTI JR.,
MICHAEL YANNOTTI,
and LOUIS MARIANI,

04 CR 690 (SAS)

Defendants.

---------- x

New York, N.Y.
July 27, 2005
10:30 a.m.

Before:

HON. SHIRA A. SCHEINDLIN,

District Judge

* * *

[34] As far as insufficient factual allegations, the Second Circuit has "consistently upheld indictments that do little more than to track the language of the statute charged and state the time and place in approximate terms of the alleged crime." That's United States v. Walsh, 194 F.3d 37, 44 (2d [35] Cir. 1999). Racketeering act 10 satisfied this standard.

* * *

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of November, two thousand and eight,

---

United States of America,

Appellee,

v.

Michael Yannotti,

Defendant-Appellant.

ORDER
Docket Number:
06-5571-cr

(Filed Nov. 20, 2008)

Michael Yannotti, having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ Franklin Perez
Frank Perez, Deputy Clerk